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IN THE

Supreme Court of the United States

EVELYN L. LEWIS, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, provides that military officers who are nominated by the President and confirmed by the Senate "shall be promoted" to the next higher rank unless their names are removed from the promotion list before the end of a prescribed statutory period. The question presented is:

Whether giving effect to the plain language of DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

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Evelyn L. Lewis, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., *infra*, 1a-15a) is reported at 458 F.3d 1372. The memorandum and order of the Court of Federal Claims (Pet. App., *infra*, 16a-29a) is reported at 67 Fed. Cl. 158.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 2006. A timely petition for rehearing was denied on October 26, 2006. Petitioner filed a timely application for an extension of time to file this petition on January 9, 2007. The Chief Justice granted that application, extending the time to file this petition until March 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Constitution also provides:

> The Congress shall have the power [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; [t]o make rules and regulations for the Government and Regulation of the land and naval Forces . . . [and] [t]o make all laws which shall be necessary

and proper for carrying into Execution the foregoing Powers . . . ."

U.S. Const. art. I, § 8.

The texts of 10 U.S.C. §§ 611, 618, 624, 629, and 741, and the Secretary of the Navy's regulations, SECNAVINST 1420.1A (1991), are reproduced in the Appendix, *infra*, at 56a-101a.

STATEMENT OF THE CASE

The Court of Appeals agreed in a prior case that the issue presented in the petition raises "significant questions concerning the appointment process for military officers." *Dysart v. United States*, 369 F.3d 1303, 1306 (Fed. Cir. 2004) (cited in Pet. App. at 30a-54a). Most significantly, this case raises the constitutional question whether the plain language of DOPMA — which provides that military officers who have been nominated by the President and confirmed by the Senate "shall be promoted" unless their names are removed from the promotion list by the end of a prescribed statutory period — violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The Court of Appeals adopted a tortured interpretation of DOPMA to avoid what it perceived to be constitutional problems otherwise arising from DOPMA's plain meaning.

The Court should grant review to restore Congress' clear intent in enacting DOPMA and to preserve the rights of thousands of military officers to be promoted in accordance with a clear statutory scheme. Because the question presented generally arises only in the Federal Circuit, the decision below effectively creates a nationwide rule. Absent review, the decision will therefore subject qualified military officers to unwarranted denials or delays of promotion. It will do so contrary to the plain language of DOPMA and Congress' equally clear goal of creating an efficient ap-

pointment process for the maintenance of the modern military. And it will do so based on the mistaken constitutional concern that *Marbury*, rather than simply describing the nature of the appointment at issue in that case, instead created an inflexible rule governing *all* appointments over two centuries later. Further percolation of the question presented is neither necessary nor warranted. The Court should grant review.

A. The Statutory Scheme.

This case concerns the meaning and constitutionality of DOPMA, Pub. L. No. 96-513, 94 Stat. 2839 (1980), codified at 10 U.S.C. § 611 *et seq.* (signed into law by President Carter, with technical amendments signed by President Reagan).[1] DOPMA was proposed by the Department of Defense ("DOD") in order to modernize the military's officer personnel law. *See* S. Rep. No. 96-375, at 75 (1980); H.R. Rep. No. 96-1462, at 47 (1980). The House Committee on Armed Services likewise recognized that DOPMA's predecessor statute "was drafted at a time when lawmakers could not have foreseen the requirements for large, ready forces on a[] sustained basis" and therefore did not address management issues faced by the modern military. H.R. Rep. No. 96-1462, at 9. DOPMA was a reaction to that problem, and, according to the DOD, would "provide the services a more equitable, effective, and efficient system to fill officer force structure requirements and manage the officer corps." *Id.* at 56.

DOPMA's efficient and uniform system governing the promotion of military officers is needed more today than it was when DOPMA was enacted. Literally thousands of of-

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[1] Certain of DOPMA's provisions that are not relevant here were amended in 2006. *See* John Warner Nat'l Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). Citations herein refer to the prior version of the statute.

ficer promotions occur every year in the services. *See, e.g.*, 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006). DOPMA, which governs all such promotions, ensures that they take place when needed to ensure the readiness of our military in the modern era. There can be no question but that DOPMA falls within Congress' core powers. *See* U.S. Const. art. I, § 8 ("The Congress shall have power . . . [t]o raise and support armies . . . [t]o provide and maintain a Navy . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

DOPMA comprehensively prescribes the "appointment" of military officers selected for promotion. It provides that "[a]ppointments . . . shall be made by the President, by and with the advice and consent of the Senate" except in the case of certain low-ranking officers not at issue in this case. 10 U.S.C. § 624(c) (further providing that appointments to the rank of first lieutenant or captain in the Army, Air Force, or Marine Corps, or to lieutenant (junior grade) or lieutenant in the Navy "shall be made by the President alone").[2] The appointment process begins when the Secretary of the relevant military service determines that it is necessary to convene a selection board to recommend the selection of active-duty officers for promotion to the "next higher permanent grade." *Id.* § 611(a). The selection board prepares a report recommending officers for promotion, which is reviewed by the Secretary of the appropriate service, who then forwards the report to the Chairman of the Joint Chiefs of Staff (for certain officers) and to the Secretary of Defense (for all officers). *Id.* §§ 618(a)(1), (b)(1), & (c)(1). The Service Secre-

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[2] DOPMA governs promotions for members of the Army, Air Force, Navy, and Marine Corps. The Secretary of the Navy's implementing regulations track the statute. *See* SECNAVINST 1420.1A. Similar statutory schemes govern promotions of officers in the Coast Guard, *see* 14 U.S.C. § 271 *et seq.*, and of reserve officers in the Army, Air Force, Navy, and Marine Corps. *See* 10 U.S.C. § 14001 *et seq.*

taries are not required to accept a report of the selection board and may return the report to the board for further proceedings. *Id.* § 618(a)(2). Likewise, the Chairman may make comments and return a report to the Secretary concerned or in certain circumstances may return the report to the selection board for further proceedings. *Id.* §§ 618(b)(3), (4).

Once a report is approved by all pertinent officials, the Secretary of Defense transmits it to the President for approval or disapproval. *Id.* § 618(c)(1). The President may remove the name of any officer recommended for promotion on the selection board's report. *Id.* § 629(a).

The list of officers approved for promotion by the President is then submitted to the Senate for its advice and consent. *Id.* § 629(b). If the Senate does not confirm an officer, his or her name is removed from the list. *Id.* If the Senate confirms the officer, on the other hand, he or she "*shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed." *Id.* § 624 (a)(2) (emphasis added).

The Secretary of the relevant service thereafter sets the officer's actual date of "appointment," which is also the effective date of the officer's promotion to the next grade. *Id.* § 741(d)(2) ("Except as otherwise provided by law, the date of rank of an officer who holds a grade *as the result of a promotion is the date of his appointment to that grade*.") (emphasis added); *see also id.* § 624(b)(2). The Secretary informs officers of the projected effective date of their appointment and promotion by transmitting the confirmed promotion list to appropriate personnel. If the Secretary takes no further action, the officer's appointment occurs on that date. *Id.* § 741(d)(2).

The Secretary also has authority to delay the date of an officer's appointment. *Id.* §§ 624(d)(1), (d)(2). For example, the Secretary may delay the appointment if there is

"cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." *Id.* § 624(d)(2).[3] DOPMA further provides that

> [t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice *before the effective date of the appointment*, in which case such written notice shall be given as soon as practicable.

Id. § 624(d)(3) (emphasis added).

During any period of delay, the Secretary has the authority to decide whether to retain an officer on the promotion list. *Id.* §§ 624(d)(1), (d)(2); SECNAVINST 1420.1A ¶ 23(e). On authority delegated by the President, the Secretary may remove an officer's name from the promotion list during the statutory delay period. *Id.*; *see also* Pet. App. 10a-11a (agreeing that the President can delegate both the authority to appoint military officers and the authority to decline to appoint officers) (collecting cases).

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[3] DOPMA also provides that:

> Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if -- sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of; [] an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer; [] a board of officers has been convened under chapter 60 of this title to review the record of the officer; or [] a criminal proceeding in a Federal or State court is pending against the officer.

Id. § 624(d)(1).

DOPMA also creates a maximum period of delay of eighteen months from "the date on which the officer otherwise would have been appointed." 10 U.S.C. § 624(d)(4). At the end of that eighteen-month period, unless the officer's name has first been *removed* from the promotion list, that officer is unambiguously promoted under the statute. *See id.* § 624(a)(2) ("Except as provided in subsection (d) [the delay provision], officers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grad and competitive category are needed.") (emphasis added). The officer is likewise formally appointed on that date. *Id.* § 624(d)(4) ("An *appointment* of an officer may not be delayed under this subsection for more than six months after the date on which the officer *otherwise would have been appointed* unless the Secretary concerned specifies a further period of delay. An officer's *appointment* may not be delayed . . . more than 18 months after the date on which such officer *would otherwise have been appointed.*") (emphases added); *see also id.* § 624(b)(2) ("[t]he date of rank of an officer *appointed to a higher grade under this section* is determined" by the Secretary under § 741(d)) (emphasis added).

The Secretary's decision to set an effective appointment date and leave the officer's name on the promotion list throughout the eighteen-month period, therefore, is the only post-confirmation Executive Branch action required to effectuate the appointment of an officer to the next permanent grade. DOPMA contemplates that the Secretary's inaction at the conclusion of the eighteen-month period constitutes the exercise of Executive discretion in favor of appointment. *See id.* § 624(a)(2) ("Except as provided in subsection (d) [the delay provision], officers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed.") (emphasis added). The historical record confirms that the Executive Branch fully understands this

operation of the statute. Memoranda from Joseph Califano, a special assistant to President Lyndon B. Johnson, advised President Johnson to take action on the promotion of certain officers prior to their projected promotion dates or those officers would be "automatically appointed" under DOPMA's predecessor statute. *See* JA 120-22.[4] And as explained below, the Government has more recently conceded in litigation conducted in the Court of Federal Claims that, absent the prior removal of an officer's name from the promotions list, appointments are effectuated at the end of DOPMA's prescribed statutory period as a matter of course.[5]

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[4] Citations to the "JA" herein refer to the Joint Appendix filed in the Court of Appeals. The memoranda to President Johnson were obtained from the Lyndon Baines Johnson Library and Museum. *See, e.g.*, JA 121, Dec. 16, 1965 Mem. from Joseph Califano to Pres. Johnson ("Based on these circumstances it is recommended that you remove these officers from the promotion list on the ground that they are not qualified for promotion. [Redacted] will be automatically promoted on December 20 and [redacted] December 18 unless you act before these dates.") (redactions in original); JA 122, Feb. 10, 1966 Mem. from Joseph Califano to Pres. Johnson ("Unless you take the recommended removal action before February 15, 1966 [redacted] will be automatically promoted.") (redaction in original); *see also* JA 120, Dec. 13, 1965 Mem. from James Cross for Joseph Califano ("Presidential approval for the withdrawal of [officers'] names will be necessary in the case of Lieutenant [redacted] before 18 December and for Captain [redacted] before 20 December. These are the dates when the officers complete the service required for advancement to the next higher permanent grade.") (redactions in original).

[5] Moreover, after an officer is promoted, the President and the Service Secretaries, of course, retain the power to dismiss or otherwise discipline those officers. *See, e.g.*, 10 U.S.C. § 625 (providing that the President may vacate promotions to Brigadier General and Rear Admiral (lower half) within eighteen months after promotion); *id.* § 801 *et seq.* (providing for dismissal and other sanctions pursuant to the Uniform Code of Military Justice); *id.* § 1161(b) (providing that the President may drop a commissioned officer from the rolls in certain circumstances); *id.* §§ 1181, 1182 (providing for boards of inquiry to determine whether an officer should be retained on active duty).

B. Factual Background.

The petitioner, Evelyn L. Lewis, M.D., entered active duty in the United States Navy in 1983. She was promoted on schedule to the rank of Commander and was selected on schedule for promotion to the rank of Captain. The President nominated her to that rank on April 21, 1999. *See* 145 Cong. Rec. S4068, S4069 (daily ed. Apr. 21, 1999). She was confirmed by the Senate on June 30, 1999, *id.* at S7966, S7967 (daily ed. June 30, 1999), and was given a projected promotion date of August 1, 2000. JA 202.

On June 27, 2000, however, Dr. Lewis was advised that her promotion had been delayed because it had been reported that she did not possess a valid, unqualified state medical license recognized by the Navy, and that consideration was being given to removing her name from the promotion list.[6] JA 149. On September 7, 2000, she was informed that, for the same reason, her promotion was being delayed for up to eighteen months. JA 207. During this period, several of her supervising officers wrote letters in support of her efforts to demonstrate that she was professionally qualified and should be promoted to Captain even without an unqualified license.[7]

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[6] This occurred despite the fact that, in May 2000, a Naval Board of Inquiry determined that Dr. Lewis had "not committed substandard performance of duty as evidenced by a failure to maintain the required professional licensure to practice medicine," and that she should not be administratively separated from the Navy. JA 147-48.

[7] *See, e.g.*, JA 155-56, July 17, 2000 letter from Peter D. Kent, Captain, Medical Corps, United States Navy, Clinical Investigation Program ("Very clearly, your demonstrated professionalism makes you a substantial asset to the Navy's medical department. Your accomplishments were appropriately recognized by your promotion selection board."); JA 157-58, July 11, 2000 letter from Warren A. Jones, MD, Captain, Medical Corps, United States Navy, Director ("I have had the pleasure of sitting on Selection Boards and in those efforts have seldom seen a record of a Naval Officer with the outstanding skills CDR Lewis possesses.").

Despite having known about the reasons for the delay of Dr. Lewis' promotion for over two years (and having received documentation, including supporting letters from supervising officers, demonstrating that she did not need an unqualified medical license to serve as a Captain in the Navy Medical Corps), by February 1, 2002, the last date to which Dr. Lewis' promotion could have been delayed under DOPMA, her name had not been removed from the promotion list. It was not until May 10, 2002, *ninety-nine days after the last possible date of promotion delay*, that the Secretary of the Navy removed her name from the promotion list. JA 238-39, 247. Dr. Lewis retired from the Navy as a decorated officer effective January 1, 2004. JA 259-60.

C. Procedural History.

1. On September 26, 2000, Dr. Lewis filed a complaint in the United States District Court for the District of Columbia alleging that the Secretary of the Navy's action in delaying her promotion was arbitrary and capricious because her promotion was delayed pursuant to a DOD policy memorandum which misinterpreted 10 U.S.C. § 1094, and which did not apply to her because she did not provide direct patient care requiring an unrestricted license. The District Court granted the government's motion to dismiss. *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56 (D.D.C. 2001).

While Dr. Lewis' appeal from that decision was pending, she applied to the Board for Correction of Naval Records ("BCNR") for a determination that she had been promoted to the rank of Captain because the Secretary had not removed her name from the promotion list before the last possible date of delay. Her application was denied on February 10, 2003. JA 254-55.

On April 30, 2003, the Court of Appeals for the District of Columbia Circuit issued a *per curiam* decision granting Dr. Lewis' motion to remand and, to the extent she sought to have her case transferred to the Court of Federal Claims, in-

structing her to amend her complaint to include a damages claim. *Lewis v. Rumsfeld*, No. 01-5295, 2003 WL 21018861 (D.C. Cir. Apr. 30, 2003). Dr. Lewis did so, and the District Court transferred her case to the Court of Federal Claims. *See Lewis v. Rumsfeld*, No. 1:00CV02292 (RMU) (D.D.C June 2, 2003).

2. In the Court of Federal Claims, Dr. Lewis again alleged that the regulation regarding licensing did not apply to her and further argued that, under the clear language of DOPMA, she was promoted to the rank of Captain and was therefore was entitled to back pay for the period she would have been a Captain while still on active duty (August 1, 2000 to December 31, 2003), as well as the retired pay of a Captain.[8]

At the time the case was transferred to the Court of Federal Claims, a decision of that court fully supported Dr. Lewis' reading of DOPMA. *Rolader v. United States*, 42 Fed. Cl. 782 (1999), held that an officer whose name was never removed from the promotion list before the last possible date of statutory delay had been "promoted" under DOPMA — precisely the reading Dr. Lewis asserted in her complaint. Indeed, the Government conceded the point in *Rolader*. *See id.* at 786-87 (stating that "[t]he Government *concedes* that if no recommendation for removing plaintiff's

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[8] Under DOPMA, if no action is taken during a promotion delay and the officer's name is retained on the promotion list, then "the officer shall upon ... promotion ..., have the same date of rank, the same effective date for pay and allowances in the higher grade to which appointed, and the same position on the active-duty list as he would have had if no delay had intervened." 10 U.S.C. § 624(d)(2). Dr. Lewis therefore claimed that she was entitled to back pay and retirement pay effective back to the date she was promoted to Captain under this provision and the Military Pay Act, 37 U.S.C. § 204. The Court of Federal Claims held that it had Tucker Act jurisdiction over Dr. Lewis' case because she had properly invoked a money-mandating statute in the Military Pay Act. Pet. App. 21a-22a.

opportunity to pass on this issue. Absent review, the decision below will therefore wrongly inject uncertainty into an area where certainty and predictability are paramount; thousands of officers proceed through the military promotions system each year, and the efficiency of this system is integral to the national defense effort. And there is no chance that the Federal Circuit will correct its own error in interpreting DOPMA: twice since *Dysart*, including in the decision below, the Court of Appeals has reaffirmed that Petitioner's reading of DOPMA violates *Marbury* and the Appointments Clause. The Court should grant the petition.

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

A. The Question Is Recurring.

Literally thousands of military appointments take place each year. From January 3 through September 30, 2006 alone, Congress considered 7,800 Air Force nominations, 8,855 Army nominations, 6,968 Navy nominations, and 1,293 Marine Corps nominations. *See* 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006).[10] DOPMA governs the appointment of all such military officers. It is hardly surprising, then, that the question presented here is a recurring one. To the contrary, it has repeatedly been the subject of litigation in the Court of Federal Claims and the Federal Circuit. *See, e.g.*, Pet. App. 1a-15a; *Dysart*, 369 F.3d 1303; *Rolader*, 42 Fed. Cl. 782; *see also Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993) (raising same issue under statute governing Coast Guard promotions).

Indeed, even more recently than the decision below, the Federal Circuit rejected a cross-appeal from an officer contending that he had been promoted under DOPMA after his

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[10] Of these, the following nominees were confirmed: 7,783 in the Air Force; 8,831 in the Army; 6,694 in the Navy; and 1,289 in the Marine Corps. *See* 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006).

appointment had been improperly delayed even though the Court of Federal Claims initially agreed, before reconsidering its decision in light of *Dysart*, that the officer had been promoted under the statute. *See Barnes v. United States*, 473 F.3d 1356, 1363 (Fed. Cir. 2007) ("Although he argues that it was wrongly decided, Barnes himself recognizes that this panel is bound to follow *Dysart* unless and until it is overturned by the court sitting en banc. . . . Nor are we persuaded, as requested, to propose en banc review ourselves."); *see also Barnes v. United States*, 66 Fed. Cl. 497 (2005) (vacating prior opinion, 57 Fed. Cl. 204 (2003), that had held Barnes was promoted under DOPMA, in light of *Dysart*), *rev'd*, 473 F.3d 1356.

These questions also arise before the BCNR. *See, e.g.*, Amicus Br. of Dr. Lewis, et al., in *Dysart v. United States*, 2003 WL 24305578, at *3. Because record correction proceedings are covered by the Privacy Act, 5 U.S.C. § 552a, the exact number of these cases pending before the BCNR and its sister boards in other military departments is unknown.

B. The Question Is Important.

The Federal Circuit acknowledged that these cases "present[] significant questions concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306. For several reasons, the Court of Appeals is correct on that score.

First, this case implicates the interpretation of an important federal statute governing the appointment of thousands of military officers every year. In both this case and *Dysart*, the Federal Circuit disguised what is essentially a constitutional holding that DOPMA violates *Marbury* and the Appointments Clause as a holding that DOPMA's plain terms mean something other than what they say. The Court of Appeals' interpretation cannot survive serious review. Properly understood, DOPMA provides that Dr. Lewis was "appointed" to the next higher rank when her name was not re-

moved from the promotions list by the end of the statutory period. The Court of Appeals' contrary holding not only misreads the statute but places military officers in limbo by imposing a system under which the President or his delegate can delay military promotions indefinitely despite the statute's plain language.

Second, this case raises core questions about the separation of powers. The statutory scheme is critical to maintaining an efficient military appointment process. The appointment of military officers is unquestionably an area in which Congress has a significant interest in light of its broad constitutional powers to maintain a navy and regulate other military affairs. *See* U.S. Const. art. I, § 8 (Congress has "the power to . . . raise and support Armies; [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval forces," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . . ."); *see also* 125 Cong. Rec. 34209 (1979) (statement of Sen. John Stennis) (recognizing that the "[Armed Services] committee is charged with the responsibility of making rules for the government and regulation of our military forces" and that DOPMA "goes to the very heart of that congressional responsibility with our military system").

In fact, Congress' interest in maintaining an efficient system for appointments is at an apex today given the current size of the officer corps, the need for the deployment of officers at the appropriate rank and grade levels all around the world, and current plans to expand the size of the military. *See* Department of Defense: Active Duty Military Personnel by Rank/Grade, *available at* http://siadapp.dior.whs.mil/personnel/MILITARY/rg0612.pdf (Dec. 31, 2006) (last visited Mar. 22, 2007) (stating that, as of Dec. 31, 2006, there were 221,726 active duty officers in the armed forces); *see also, e.g.*, Peter Baker, *U.S. Not Win-*

ning War in Iraq, Bush Says for 1st Time: President Plans to Expand Army, Marine Corps to Cope with Strain of Multiple Deployments, Wash. Post, Dec. 20, 2006, at A1. Despite the fact that, in enacting DOPMA, Congress was legislating in an area involving its core powers, the Federal Circuit perceived DOPMA as encroaching on Executive power. It did not even address the possibility that DOPMA is instead a balanced approach to military promotions that respects the appointments system and also carries out Congress' duty to provide for and regulate the armed forces.

Third, this case raises the issue whether *Marbury* created an inflexible constitutional rule regarding what particular Executive action is necessary to effectuate any and all appointments under the Constitution. The Federal Circuit based its analysis on a flawed reading of *Marbury*. The Federal Circuit did not grapple with the question whether Congress could vary in any way the way in which the steps in the appointment process are accomplished. The Court should grant review to determine whether *Marbury*'s *description* of the appointment at issue in that case in fact created a baseline constitutional rule governing all appointments over two centuries later.

C. Absent The Court's Review, The Court Of Appeals' Decision Creates A Nationwide Rule Governing The Appointment Of Military Officers.

Claims like Dr. Lewis' are litigated almost exclusively in the Federal Circuit, because it is the only court with jurisdiction to hear appeals regarding officers' claims for back pay and retirement pay at the level applicable to the ranks to which they assert they were promoted. *See* 28 U.S.C. §§ 1295(a)(2), (3) (vesting the Federal Circuit with exclusive jurisdiction over appeals from district court decisions regarding claims for money damages against the United States); *see also United States v. Hohri*, 482 U.S. 64, 72 (1987) (stating that Tucker Act claims for damages of more than $10,000

against the United States "may be brought only in the United States Claims Court" and "are appealable only to the Federal Circuit. . . . Claims for less than $10,000 . . . may be brought either in a federal district court or in the United States Claims Court. These claims . . . also are appealable only to the Federal Circuit") (citing 28 U.S.C. §§ 1491(a)(1), 1346(a)(2), 1295(a)(2), (3)).

Two judges of the Court of Federal Claims have read DOPMA to provide for military promotions without raising any constitutional issues. *See Barnes*, 57 Fed. Cl. at 218 (holding that the Navy's delay in removing Lieutenant Barnes from the promotion list until after the statutory delay period had expired "accomplished his promotion"), *opinion vacated by* 66 Fed. Cl. 497 (reversing prior holding in light of *Dysart*), and *Rolader*, 42 Fed. Cl. at 787 (holding that because officer's name was not removed from promotion list prior to the expiration of the delay period, he was promoted as a matter of law).

The Federal Circuit decided this case solely based on its prior holding in *Dysart* and denied rehearing. *See* Pet. App. 10a (resolving Dr. Lewis' argument that she had been promoted because her name was not removed from the promotion list by the last possible date of statutory delay based on *Dysart* because *Dysart* was binding on the panel and "Lewis' claim is not distinguishable"); Pet. App. 55a. Even more recently, the Federal Circuit again refused to reconsider *Dysart*. *See Barnes*, 473 F.3d at 1363. The Federal Circuit has thus conclusively demonstrated that it will not revisit this issue. Absent review, the decision below will create a *de facto* nationwide rule.

II. THE DECISION BELOW WRONGLY SUBJECTS THOUSANDS OF QUALIFIED MILITARY OFFICERS TO UNWARRANTED PROMOTION DENIALS AND DELAYS.

A. DOPMA's Plain Language Provides For Appointment When An Officer Is Retained On The Promotion List.

The Federal Circuit held that Dr. Lewis was not promoted even though her name remained on the promotion list after the last date of statutory delay had expired because "'the language of [section 624] does not provide for automatic appointment . . . .'" Pet. App. 10a (alteration in original) (quoting *Dysart*, 369 F.3d at 1313). Rather, the Court held, "the statute provides that appointments are made 'by the President, by and with the advice and consent of the Senate.'" *Dysart*, 369 F.3d at 1313 (quoting 10 U.S.C. § 624(c)). However, reading DOPMA as a whole compels the conclusion that a military appointment is effected after the specific steps set forth in the statute have taken place.

The promotion process under DOPMA is perfectly obvious. As already explained, the relevant statutes provide for nomination of an officer by the President, 10 U.S.C. §§ 618(c)(1), 629(b), consideration of nominations by the Senate, *id.* § 629(b), and, after confirmation, action by the Secretary to project a promotion date for the officer, *id.* §§ 624(b), 741(d), or to delay the officer's "*appointment under this section*" (an action that carries with it the possibility that a confirmed officer's name will be removed from the promotion list and that he or she will therefore never be appointed). *Id.* § 624(d) (emphasis added). Thus, under DOPMA, an officer's appointment to the next highest rank and grade occurs after confirmation, on the projected effective date of promotion given the officer by the Secretary of his or her service, unless the Secretary takes some action to

delay the appointment and remove the officer from the promotion list.

This understanding of the military appointments process is the only sensible way to read the statute. As already explained, the Executive Branch is aware of DOPMA's provisions, *see* JA 120-22 (Mem. from Joseph Califano to Pres. Johnson), and, indeed, the Government has conceded in prior litigation that DOPMA operates exactly as Dr. Lewis asserts it does. Therefore, when the President nominates an officer for promotion, he does so with the understanding that the officer will be appointed after Senate confirmation absent some action by the Secretary of the relevant service to delay the appointment and potentially remove the officer's name from the promotion list during the statutorily-defined period. As such, the appointment phase is hard-wired into the nomination process for officers whose appointments are not delayed at the discretion of the Secretary.

The Federal Circuit ignored this straightforward process in holding that DOPMA does not provide for appointments. In particular, it utterly disregarded the particular provisions of DOPMA applicable to Dr. Lewis' case, *i.e.*, those governing promotions delayed by the Secretary.[11] DOPMA explicitly states that "[u]nder regulations prescribed by the Secretary concerned, the *appointment* of an officer *under this sec-*

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[11] As discussed above, the Federal Circuit focused only on the part of DOPMA restating the requirements of the Appointments Clause. This approach runs afoul of this Court's directive that "[s]tatutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The Federal Circuit likewise engaged in a piecemeal reading of DOPMA's legislative history, relying solely on snippets reflecting the constitutionally-mandated premise that appointments are made by the President with the advice and consent of the Senate, *see Dysart*, 369 U.S. at 1314, while ignoring the overarching purpose of the statute to modernize military personnel laws and to "[p]rovide common law *for the appointment* of Regular officers." S. Rep. 96-375, at 76 (emphasis added).

tion may be delayed . . . ." 10 U.S.C. § 624(d)(1) (emphases added); § 624(d)(2) (same). It further states that "[t]he *appointment of an officer may not be delayed under this subsection* unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice *before the effective date of the appointment*." *Id.* § 624(d)(3) (emphases added). These provisions would be meaningless if officers had no expectation of appointment unless — as would be the case under the Federal Circuit's view — the President took some additional action, beyond the steps set forth in DOPMA, at some unknown future time. Nothing in the statute (or the Court of Appeals' decision) remotely indicates what that action might be, or when it might take place. The result is manifest uncertainty.

Under a reading that ensures certainty, by contrast, the language of the delay provisions instead assumes that an appointment will occur if the Secretary of the relevant service does not invoke them, and, if they are invoked, that an appointment will not occur unless the officer concerned is "retained on the promotion list." *Id.* §§ 624(d)(1), (2).[12] There would likewise be no reason to require that an officer be in-

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[12] The subsection of the statute dealing with delays due to pending disciplinary or other proceedings against an officer provides that:

> If no disciplinary action is taken against the officer, if the charges against the officer are withdrawn or dismissed, if the officer is not ordered removed from active duty under Chapter 60 of this title, or if the officer is acquitted of the charges brought against him, as the case may be, then unless action to delay an appointment has also been taken under paragraph (2) the officer shall be retained on the promotion list . . . .

Id. § 624(d)(1).

The more general delay provision states: "If the Secretary concerned later determines that the officer is qualified for promotion to such grade, the officer shall be retained on the promotion list . . . ." *Id.* § 624(d)(2).

formed of any delay before the effective date of his or her appointment unless the officer would expect to be promoted on that date absent notification to the contrary. *Id.* § 624(d)(3).

The history of the notification provision confirms this understanding. When DOPMA was passed in 1980, it provided only that "[t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the delay." 94 Stat. 2858. This language was amended in 1981, when Congress added the phrase "unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." Defense Officer Personnel Management Act Technical Corrections Act, Pub. L. No. 92-22 § 4(d)(3)(D), 95 Stat. 127. The House Report recognized that under the language of the original provision, an officer might be promoted simply because notice of a delay had not been transmitted to him or her in a timely fashion.[13]

The provision of DOPMA that the Federal Circuit pointed to in reaching the opposite conclusion is simply a restatement of the language of the Appointments Clause. Thus, although the Federal Circuit couched its holding in terms of statutory construction, the true question here is whether DOPMA is inconsistent with *Marbury* and the Appointments Clause. As we now explain, it is not.

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[13] *See* H.R. Rep. No. 97-141, at 14 (1981) ("This amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or absent without leave) to receive written notice that the promotion is being delayed.").

B. DOPMA Does Not Violate The Appointments Clause.

The Federal Circuit's tortured statutory construction was colored by the underlying premise of its decision — namely, the Court's belief that the statute raised Appointments Clause problems because: (1) the President has absolute discretion regarding whether to appoint an officer who has been confirmed to the next highest rank and grade; and (2) the "shall be promoted" language of the statute improperly cabins that discretion.[14] *See, e.g.*, Pet. App. 10a (noting that in *Dysart* the court "further held that the statute could not constitutionally provide for automatic appointment because 'military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute'") (quoting *Dysart*, 369 F.3d at 1313, 1315); *Dysart*, 369 F.3d at 1314 (stating that "[p]rotecting the role of the President in the appointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention"); *see also Dysart*, 369 F.3d at 1316 ("The Constitution contemplates that, after confirmation, the President may refuse to execute the appointment."). Under the Federal Circuit's view of the Appointments Clause, therefore, no

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[14] To support this conclusion, the Federal Circuit pointed to language in DOPMA providing that "'[t]he President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter.'" *Dysart*, 369 F.3d at 1317 (quoting 10 U.S.C. § 629(a)). As the Court of Federal Claims correctly observed, however, this language cannot be read in isolation but must be considered in the context of the overall statutory scheme. *See Rolader*, 42 Fed. Cl. at 786 (noting that the Army and the Navy "construe sections 624 and 629 as operating in tandem, so that the eighteen month outer limit on delay precludes removal of a name after that point") (citing SECNAVINST 1420.1A ¶ 23 (1991); Army Regulation 624-100, *Promotion of Officers on Active Duty*, Update, ch. 2-10(b) (1984)).

limits may be placed on the President's discretion to appoint or choose not to appoint officers.

That view is incorrect. This Court has held that the Appointments Clause is violated when Congress enlarges its own power in the appointments process. For example, Congress ran afoul of the Appointments Clause when it vested the power to make appointments *in itself*. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress could not constitutionally provide for appointment of members of the Federal Election Commission by the President *pro tempore* of the Senate and the Speaker of the House). DOPMA does not involve any similar expansion of congressional power. The only power Congress itself has under the statute is the Senate's power to confirm (or choose not to confirm) military officers who have been nominated by the President. *Cf. Morrison v. Olson*, 487 U.S. 654, 694 (1988) (upholding independent counsel statute and observing that the "case [did] not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch").

Unlike the appointments scheme at issue in *Buckley*, DOPMA amply protects the constitutionally mandated role of the Executive in the appointment process. The President makes the decision regarding which officers to nominate for promotion and has the sole power to remove officers' names from the list recommended by the selection board. 10 U.S.C. § 629(a). The Service Secretary, to whom even the Federal Circuit agreed the appointment power may be delegated, has a period of time from an officer's confirmation to the projected promotion date during which he or she can determine whether an officer's appointment should be delayed. (In Dr. Lewis' case, the gap between the date of her confirmation and her projected promotion date was over a year.)

The Secretary's power to delay an appointment is quite broad; in addition to being able to delay an appointment if the officer is subject to court-martial, disciplinary, or other

similar proceedings, the Secretary may delay an officer's appointment "in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. § 624(d)(2). If an officer's appointment is not delayed, that implicitly reflects a determination by the Secretary that it should go forward on the projected date. The statute further provides the Secretary with the discretion to ultimately remove an officer whose appointment has been delayed from the promotion list such that he or she would not be appointed. *Id.* § 624(d); *see also* SECNAVINST 1420.1A ¶ 23.

These statutory provisions demonstrate that, contrary to the Federal Circuit's view, the President and his delegates maintain their discretion in appointments under DOPMA. All that Congress has required through the statute is that the Executive power to appoint or decline to appoint military officers be exercised within a reasonable time period — either during the period between confirmation and the officer's projected promotion date or, in the case of officers like Dr. Lewis whose promotions are delayed, before the expiration of the delay period. The President and the Service Secretaries still have the power to remove the officer or take other actions against him or her. *See, e.g.*, 10 U.S.C. §§ 625, 801, 1161(b), 1181, 1182. DOPMA's reasonable time limitation does not result in any significant decrease of Executive power. *Cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that under separation of powers principles, Congress could not "reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment").

Rather than violating the separation of powers, DOPMA simply strikes a necessary balance between the President's power in the area of appointments and Congress' core constitutional power to provide for and regulate the military. *See,*

e.g., 126 Cong. Rec. 30781 (1980) (statement of Sen. Sam Nunn) ("[W]e must recognize the responsibilities of Congress and the President in officer management. We need an officer system controlled by Congress which will also give the President, as Commander in Chief, as much management flexibility as he can [] constitutionally be granted . . . ."). This Court "ha[s] never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison*, 487 U.S. at 693-94 (internal quotation marks omitted). When proposing and enacting DOPMA, the DOD and Congress both recognized the need for an efficient, modern process to manage the high volume of military promotions in today's military. *See* S. Rep. No. 96-375, at 75; H.R. Rep. No. 96-1462, at 9, 47, 56. The Act's reasonable time limitation on the exercise of the appointment power is merely a mechanism to ensure that this need is met, and the time limitation thus falls squarely within Congress' core powers. *See* U.S. Const. art. I, § 8.

If there were any doubt about this conclusion, it is resolved by the fact that Congress has greater flexibility in the appointment of inferior officers like Dr. Lewis.[15] *See, e.g.*, *Weiss*, 510 U.S. at 186-87 (Souter, J., concurring). In particular, Congress may vest the appointment of these officers in the President alone or in other government entities. *See*

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[15] There are thousands of naval captains (or their equivalent, colonels) in the military, all of whom are removable, and none of whom qualify as principal officers. *See Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) ("Military officers performing ordinary military duties are inferior officers, and none of the parties to this case contends otherwise. Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers is a principal officer.") (internal citations omitted); *cf. Morrison*, 487 U.S. at 671-72 (holding that independent counsel was an inferior officer because, *inter alia*, she was "subject to removal by a higher Executive Branch official," she had no authority to formulate policy for the Government or the Executive Branch, and her office was of limited jurisdiction and tenure).

U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the heads of Departments."). The Federal Circuit recognized that Congress may vary the appointments process for such officers, *see Dysart*, 369 F.3d at 1314, but utterly failed to address the import of this fact for the appointment of military officers.

It is true that Congress has not chosen to vary the appointment process for most military officers. However, given its greater power to disregard the role of the President in the appointments process for inferior officers altogether, it follows that Congress must, at the very least, have the flexibility to set up a scheme for the appointment of such officers that ensures that all the constitutionally required steps of the military promotion process occur as efficiently as possible. That is all that it has done with the current statutory framework.

C. DOPMA Does Not Violate *Marbury*.

Marbury provides that an appointment is made "when it is shewn that [the President] has done everything to be performed by him." 5 U.S. at 157. It does not create any rule, much less a *constitutional* rule, regarding precisely what kind of action is required for that showing. In *Marbury*, the President's signature on the commission was the executive act required to effectuate the appointments of justices of the peace in the District of Columbia, the position for which Marbury had been nominated and confirmed. *Id.* at 150-51. Accordingly, Marbury's appointment was effective when signed; delivery of the appointment to him was not required. DOPMA simply creates a modern-day version of this scenario. When an officer's projected promotion date, or the last permissible date of delay, comes and goes without removal of the officer's name from the promotion list, the Executive has effectively signed the appointment.

The Federal Circuit was wrong to assume that *Marbury* requires the appointments process to occur in a particular manner.[16] *Marbury* dealt with a particular appointment process; it did not foreclose the possibility that other processes could also satisfy the requirements of the Appointments Clause. Dr. Lewis and other officers like her are nominated by the President under a statute that the President understands will make a confirmed officer's appointment effective unless his or her name is removed from the promotion list. Thus, the President's nomination and failure to take action to remove an officer from the promotion list within the requisite time frame is the showing *Marbury* requires — that the President "has done everything that is to be performed by him." 5 U.S. at 157; *see also id.* ("[T]his [appointment] power has been exercised when the last act, required from the person possessing the power, has been performed.").

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[16] Under the Federal Circuit's interpretation of DOPMA, giving the President unfettered discretion in appointments, Congress would never be able to craft efficient appointments schemes and the statutes currently providing similar mechanisms for appointments in the Coast Guard and the reserve officer corps, *see* 14 U.S.C. § 271 *et seq.* and 10 U.S.C. § 14001 *et seq.*, would be unconstitutional. Moreover, taking the Federal Circuit's position to its logical extreme, Congress would never be able to require that military officers have any particular qualifications for their positions as the Executive Branch would have unlimited decision-making power regarding who is nominated and appointed to be an officer. As even the Court of Appeals acknowledged, that is simply not the law. *See* Pet. App. 7a (recognizing that "Congress can restrain the President's authority to appoint particular classes of persons to officer positions or bar appointment unless particular procedures are followed").

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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March 23, 2007

APPENDIX

APPENDIX A

Evelyn L. LEWIS, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 05-5155.

United States Court of Appeals,
Federal Circuit.

Aug. 14, 2006.

Before RADER, Circuit Judge, CLEVENGER, Senior Circuit Judge, and DYK, Circuit Judge.

DYK, Circuit Judge.

Dr. Evelyn Lewis ("Lewis") appeals the decision of the Court of Federal Claims denying relief from the Secretary of the Navy's decision to delay her promotion and subsequently to remove her name from a military promotion list. Lewis urges that she was promoted as a matter of law under 10 U.S.C. § 624, and also that the decision of the Board of Correction for Naval Records ("BCNR"), sustaining the Secretary's actions denying her promotion, was based on an incorrect interpretation of 10 U.S.C. § 1094(a)(1). We hold that Lewis' claim that she was promoted as a matter of law is barred by our decision in *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), and that the BCNR's decision deny-

ing her request for a correction of her personnel record was based on a proper understanding of 10 U.S.C. § 1094(a)(1). We therefore affirm the decision of the Court of Federal Claims.

BACKGROUND

At all relevant times, Lewis was an active-duty Commander in the Navy Medical Corps, and held a "restricted" Oklahoma medical license that limited her practice of medicine to federal facilities. On April 21, 1999, the President nominated Lewis for promotion to the rank of Captain. On June 30, 1999, the Senate confirmed her nomination. However, she could not achieve the rank of captain without being appointed to the position by the President. *Dysart v. United States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004).

Prior to October 1, 1999, 10 U.S.C. § 1094 required all "health-care professionals" in the Department of Defense ("DoD") "provid[ing] health care independently as ... health-care professional[s]" to carry a "current license." 10 U.S.C. § 1094(a)(1) (1994). It defined "health-care professional" as "person[s] [including physicians] providing direct patient care." *Id.* at § 1094(d)(2). On October 1, 1999, a new sentence was added to section 1094(a)(1), which provided that "[i]n the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license...." 10 U.S.C. § 1094(a)(1) (2000).

In December 1999, the Navy Bureau of Medicine and Surgery directed Lewis to show cause as to whether she should be retained in the Navy, because she did not have an unrestricted medical license. On May 2, 2000, a Navy Board of Inquiry (BOI) conducted an investigation and found that separation was not warranted because Lewis "ha[d] not

committed substandard performance of duty as evidenced by a failure to maintain the required professional licensure to practice medicine." J.A. at 147. Nonetheless, on June 27, 2000, the Chief of Naval Personnel determined that Lewis "may not be professionally qualified for permanent promotion" because she lacked "a valid state medical license recognized by the Navy," and notified Lewis that her appointment would be delayed pending a final decision by the Secretary of the Navy. J.A. at 149.

On September 26, 2000, Lewis filed a complaint in the United States District Court for the District of Columbia asserting that the action delaying her promotion was arbitrary and capricious. In an August 15, 2001, decision the court granted the government's motion to dismiss, holding the claim was non-justiciable and Lewis had failed to exhaust administrative remedies before the BCNR. *See Lewis v. Rumsfeld*, 154 F.Supp.2d 56, 57 (D.D.C.2001). Lewis appealed to the United States Court of Appeals for the District of Columbia Circuit on August 21, 2001.

Lewis' situation continued to evolve while her case was pending before the District of Columbia Circuit.

Section 624(a) of title 10, a provision of the Defense Officer Personnel Management Act ("DOPMA"), provides that "[e]xcept as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. § 624(a)(2) (2000). Section 624(d) provides that "[a]n officer's appointment may not be delayed... more than 18 months after the date on which such officer would otherwise have been appointed...." 10 U.S.C. § 624(d)(4) (2000). Under this provision, the last date to which Lewis' appointment could be

delayed was February 1, 2002. By this date, Lewis had neither been removed from the promotion list nor appointed.

On March 5, 2002, Lewis applied to the BCNR, seeking a determination that she had been promoted to the rank of Captain by operation of law.[1] On May 10, 2002, after the expiration of the 18-month period, the Secretary of the Navy finally removed Lewis' name from the promotion list. The BCNR denied Lewis' application for relief on February 10, 2003, holding that under Secretary of the Navy Instruction ("SECNAVINST") 1120.12A and the applicable DoD policy, "the Navy properly considered [Lewis] to be professionally unqualified for promotion without an unrestricted license...." J.A. at 254. On March 31, 2003, Lewis requested voluntary retirement from active duty, and the Secretary of the Navy granted her request effective January 1, 2004.

On April 30, 2003, the District of Columbia Circuit issued a decision remanding to the district court. In a per curiam order, the court advised Lewis to seek leave of the district court to amend her complaint to include a damages claim, and to transfer the case to the Court of Federal Claims. *See Lewis v. Rumsfeld*, No. 01-5296, 2003 WL 21018861 (D.C.Cir. Apr. 30, 2003). Lewis did so, and on June 2, 2003, the district court granted her motion. The case was transferred to the Court of Federal Claims.

In the Court of Federal Claims, Lewis alleged that she was promoted to the rank of Captain as a matter of law by operation of section 624(d). She also contended that she was denied promotion based upon an erroneous interpretation of

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[1] Section 1552 of title 10 gives the military secretaries power to correct military records using civilian boards. It provides that "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(2) (2000).

section 1094. She sought pay and allowances of a Captain from August 1, 2000, to December 31, 2003, and the retired pay of a Captain.

The government moved to dismiss, or in the alternative, for judgment on the administrative record. *Lewis v. United States*, 67 Fed.Cl. 158, 163 (2005). The Court of Federal Claims (Judge Susan G. Braden) held that it had jurisdiction over Lewis' claim under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), and the Military Pay Act, 37 U.S.C. § 204 (2000). *Id.* at 160-61. While recognizing that "the merits of a promotion determination are non-justiciable," the court held that Lewis' claim was justiciable because "the court can intervene ... to ensure that the [promotion] decision was made in a proper procedural manner." *Id.* at 160. However, the court held that under our decision in *Dysart v. United States*, 369 F.3d at 1311-14, the President has complete discretion whether to appoint military officers. *Lewis*, 67 Fed. Cl. at 163. Accordingly, the court granted the government's motion for judgment on the administrative record. *Id.*

The appellant timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal determinations of the Court of Federal Claims, such as a judgment on the administrative record, without deference. *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed.Cir.2003).

The Tucker Act, 28 U.S.C. § 1491, authorizes actions for monetary relief against the United States to be brought in the Court of Federal Claims, but does not itself provide a substantive cause of action absent a money-mandating statute. *Martinez v. United States*, 333 F.3d 1295, 1303

(Fed.Cir.2003) (en banc). The relevant money-mandating statute in this case is the Military Pay Act, 37 U.S.C. § 204, which "provides for suit in the Court of Federal Claims when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay." *Dysart*, 369 F.3d at 1315; *see also, e.g., Holley v. United States*, 124 F.3d 1462, 1465 (Fed.Cir.1997). [2]

Here Lewis seeks military pay that was denied as a result of the Secretary's decision to delay Lewis' promotion and to remove Lewis' name from the promotion list.[3]

While resort to a correction board is not mandatory, *Martinez*, 333 F.3d at 1305, where, as here, a service member has elected to pursue relief before a corrections board, we have reviewed the board's decision to determine whether it is arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *Id.* at 1314; *see also, e.g., Chappell v. Wallace*, 462 U.S. 296, 303, 103 S.Ct. 2362, 76 L.Ed. 2d 586 (1983) ("Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence."); *Porter v. United States*, 163 F.3d 1304, 1312 (Fed.Cir.1998); *Armstrong v. United States*, 205 Ct.Cl. 754, 761 (1974).

I

We have confronted decisions by the military concerning officer retention and promotion in a variety of contexts. In

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[2] Retirement pay claims are brought under other money-mandating statutes. See, *e.g.*, 10 U.S.C. §§ 6323, 6333, 1370; see also *Sawyer v. United States*, 930 F.2d 1577 (Fed.Cir.1991) (holding that the disability retirement pay statute, 10 U.S.C. § 1201, is money-mandating).

[3] The corrections board statute, 10 U.S.C. § 1552, is not a money-mandating statute that provides the basis for a Tucker Act suit. *Martinez*, 333 F.3d at 1315.

general, we have said that the questions of the fitness of an officer to serve on active duty, and in what capacity the officer should serve, are not for the courts to decide. *Fisher v. United States*, 402 F.3d 1167, 1180-81 (Fed.Cir.2005) (en banc) (noting that the question of "who should be allowed to serve on active duty, and in what capacity" is generally nonjusticiable (citing *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed.Cir.1995))); *see also Orloff v. Willoughby*, 345 U.S. 83, 91, 73 S.Ct. 534, 97 L.Ed. 842 (1953); *Dysart*, 369 F.3d at 1315; *Adkins*, 68 F.3d at 1324. In addition, the Constitution expressly provides that only the President has the authority to appoint an officer, and thus to take the final step in the promotion process. As such, in *Dysart v. United States*, we made clear that "the President's decision not to appoint is a discretionary act that cannot be reviewed by a court," 369 F.3d at 1317, and that Congress cannot provide for automatic appointments. *Id.* ("Congress does not have the authority to require the President to exercise his appointment power....").

However, the Constitution, statutes, and regulations can appropriately regulate the categories of persons who may be appointed to particular positions and the process by which those appointments are made. For example, Congress can restrain the President's authority to appoint particular classes of persons to officer positions or bar appointment unless particular procedures are followed. *See, e.g.*, 10 U.S.C. §§ 611-41 (2000); *see also* U.S. Const. art. II, § 2, cl. 2; *Dysart*, 369 F.3d at 1306-07. If an individual has a "clear cut legal entitlement" to a position, but subordinate officials in the government misinterpret the Constitution, statutes, or regulations, and improperly decline to recommend that individual for nomination or appointment, redress may be available in the courts. *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1294-95 (Fed.Cir.2004) (stating that an action for money arises under the Military Pay Act when an individual has a "clear-

cut legal entitlement" to a promotion). Thus, the courts can review promotion decisions for violations the Constitution,[4] statutes,[5] or regulations.[6]

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[4] *See generally, e.g., Chappell*, 462 U.S. at 303, 103 S.Ct. 2362 (recognizing that enlisted men challenging denial of promotions based on unconstitutional discrimination can seek relief from the board under the correction board statute, and that "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence."); *Berkley v. United States*, 287 F.3d 1076, 1090-91 (Fed.Cir.2002) (addressing claim that reduction-in-force violated officers' Fifth Amendment right to equal protection by taking into account racial and gender characteristics in selecting them for involuntary separation).

[5] See, *e.g., Richey v. United States*, 322 F.3d 1317, 1325-26 (Fed.Cir.2003) (where discharge resulted from allegedly improper non-promotion decisions, court reviewed the military's promotion procedures for compliance with 10 U.S.C. § 628); *Porter*, 163 F.3d at 1311-12 (same); *Sanders v. United States*, 219 Ct.Cl. 285, 594 F.2d 804, 814, 817 (1979) (where discharge resulted from improperly denied promotions, court concluded that the military had "violated both the spirit and letter of the statute [10 U.S.C. § 3442(c), 8442(c) (1976) (repealed 1980)] and regulations."); *Doyle v. United States*, 220 Ct.Cl. 285, 599 F.2d 984, 996 (1979) (holding that promotion decision violated statutory requirement governing composition of selection board); see also *Roth v. United States*, 378 F.3d 1371, 1385 (Fed.Cir.2004) (noting that "the test[s] or standards against which this court measures the military's conduct [such as failure to promote] are inherent: they are the applicable statutes and regulations" (quoting *Adkins*, 68 F.3d at 1323)).

[6] See, *e.g., Roth*, 378 F.3d at 1386-87, 1393 (holding promotion decision was unlawful because "Officer Effectiveness Reports" were adversely affected by violation of Air Force Regulation 36-10; requiring Air Force to reevaluate promotion decision); *Evensen v. United States*, 228 Ct.Cl. 207, 654 F.2d 68 (1981) (holding that promotion decision violated regulatory requirement governing composition of selection board); *Sanders*, 594 F.2d at 817-18 (military's refusal to consider officer's eligibility for promotion based on properly corrected record violated a regulation requiring correction of an officer's record upon a showing of "probable material error or injustice.").

In such an action, the court cannot, of course, order the President or his delegate to make the appointment. *See Dysart*, 369 F.3d at 1317 ("[T]he President's decision ... whether or not to exercise his appointment power is discretionary, and ... the President cannot be compelled to appoint military officers."); *Law v. United States*, 11 F.3d 1061, 1065 (Fed.Cir.1993) (stating that the courts are "without authority to grant [] promotion[s]").[7] The question becomes whether the officer by delegation is exercising Presidential discretion in declining to grant the appointment or whether the official is improperly construing the Constitution, a statute, or regulation directing appointments (in which case the action is reviewable).

The award of back pay for an appointment that was denied by a subordinate official, as a result of an improper construction of the Constitution, a statute, or a regulation, is permissible because "[i]t is ... assumed that the constitutionally-mandated steps in the appointment process-nomination, confirmation, and appointment-would be followed absent improper action by subordinate officials, and that the rare exercise of Presidential (or Senate) discretion not to make the appointment creates no Article III bar to the action in the Court of Federal Claims," for back pay. *Dysart*, 369 F.3d at 1315; *see Glidden Co. v. Zdanok*, 370 U.S. 530, 568-71, 82 S.Ct. 1459, 8 L.Ed. 2d 671 (1962); *see also Chicago & S. Air*

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[7] *See also Randall v. United States*, 95 F.3d 339, 348 (4th Cir.1996) ("The district court would have no authority to order the Secretary of the Army to promote Plaintiff to Lieutenant Colonel."); *Adkins*, 68 F.3d at 1324 (an officer's "prayer that the Court of Federal Claims direct the Secretary to promote him to the rank of colonel plainly was a request for impermissible 'interfer[ence] with legitimate Army matters.'" (quoting *Orloff*, 345 U.S. at 94, 73 S.Ct. 534)); *Yee v. United States*, 206 Ct.Cl. 388, 512 F.2d 1383, 1388 (1975) (denying a request for a court-ordered promotion, observing that "[c]ourts generally are not in the 'promotion business'").

Lines v. Waterman S.S. Corp., 333 U.S. 103, 113-14, 68 S.Ct. 431, 92 L.Ed. 568 (1948).[8]

A

Against this backdrop, we can quickly dispose of Lewis' contention that she was promoted by operation of law pursuant to 10 U.S.C. § 624(a)(2) on the theory that the language of 624(d) mandates automatic appointment when the 18-month statutory delay period expires. We addressed and rejected the same argument, with respect to the same statute, in *Dysart*. We held that "the language of [section 624] does not provide for automatic appointment...." 369 F.3d at 1313. We further held that the statute could not constitutionally provide for automatic appointment because "military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute." *Id.* at 1313, 1315.

While Lewis contends that *Dysart* was wrongly decided, it is, of course, binding on this panel. Further, Lewis' claim is not distinguishable from *Dysart*. It is of no consequence that the President himself removed Dysart's name from the list more than six months after the deadline referred to in 624(d)(4), whereas the Secretary removed Lewis' name acting as a delegate of the President.[9] The premise of Lewis'

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[8] *See also Law*, 11 F.3d at 1065 (holding that the court has the authority to *recognize* a promotion by awarding back pay); *cf. Wood v. United States*, 107 U.S. 414, 417, 18 Ct. Cl. 761, 2 S.Ct. 551, 27 L.Ed. 542 (1883) (holding that Congress may not change an officer's grade, which requires appointment, but may change an officer's pay and direct that the officer be paid as though he had been appointed to a higher grade).

[9] Just as the authority to appoint military officers can be delegated, *see, e.g., Orloff*, 345 US. at 90, 73 S.Ct. 534; *United States v. Moore*, 95 U.S. 760, 762, 24 L.Ed. 588 (1877); *Dysart* 1312, so too can the authority to

argument is the same as Dysart's – that section 624 provides for automatic appointment. We rejected this premise in *Dysart*, and decline to revisit it now.

II

Lewis also claims that the BCNR erred in sustaining the Secretary's decision to deny her promotion. She contends that an incorrect interpretation of 10 U.S.C. § 1094 resulted in the denial of her promotion.[10] The DoD policy implemented by the Secretary is reflected in a policy memorandum that was issued by the Assistant Secretary of Defense for Health Administration ("ASD(HA)"). The memorandum provides:

> Any physician license in a licensure category that restricts the physician to practice in a federal facility or within some other confined limits does not comply with the requirement [of § 1094(a)(1)] for an "unrestricted license." Unless waived [under § 1094(a)(2)], *all physicians must have at least one current, unrestricted license....* Effective October 1, 1999, a physician without a full-scope license may not provide health care as a physician, unless a waiver is granted under this policy.

J.A. at 140. In a later memorandum, the ASD(HA) explained that the licensing requirement applies to "[a]ll physi-

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decline to appoint officers. *D'Arco v. United States*, 194 Ct.Cl. 811, 441 F.2d 1173, 1175 (1971); see also *Dysart*, 369 F.3d at 1316.

[10] In addition to arguing that section 1094 does not bar her promotion, Lewis urges that the BCNR's reliance on SECNAVINST 1120.12A was erroneous because SECNAVINST 1120.12A provides no support for the licensing requirement. The question whether the BCNR properly relied on SECNAVINST 1120.12A is irrelevant, because the BCNR's decision was fully supported by section 1094(a) itself.

cians in the DoD," including "health care personnel whose duties are entirely administrative in nature and do not involve the provision of patient care." J.A. at 142. Lewis contends that the DoD policy of requiring all physicians to carry an unrestricted license is inconsistent with section 1094.

Prior to October 1, 1999, section 1094 required all persons "provid[ing] health care independently as ... health-care professional[s]" to possess a "current license." Section 1094(e)(2) provided that "[t]he term 'health-care professional' means a physician, dentist, clinical psychologist, or nurse and any other person providing *direct patient care* as may be designated by the Secretary of Defense in regulations." 10 U.S.C. § 1094(e)(2) (emphasis added).

Before 1999 the statute did not include any special requirement applicable to physicians. 10 U.S.C. § 1094(a)(1) (1994). In October 1999, a second sentence was added to section 1094(a)(1) addressed specifically to physicians:

> In the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license that is not subject to limitation on the scope of practice ordinarily granted to other physicians for a similar specialty by the jurisdiction that granted the license.

10 U.S.C. § 1094(a)(1) (2000), as amended by Pub.L. 105-261, 112 Stat.2073.

Lewis points out that section 1094 only requires any "physician ... provid[ing] *health care as a physician*" to carry an unrestricted license. In Lewis' view, a physician only provides health care as a physician if he or she provides direct patient care. Lewis bases this argument on the fact

that a physician who does not provide direct patient care is not a "health care professional" within the meaning of the first sentence of 1094(a)(1) of the statute. However, it is irrelevant that such a physician providing indirect care may not meet the statutory definition of "health care professional" in the pre-1999 version of the statute. The question here is what is meant by the second sentence, and the operative terms do not require direct care. The definition of physician is "a person who is legally qualified to practice medicine," and the practice of "medicine" is the provision of health care. *Random House Webster's Unabridged Dictionary* at 1462 (2d ed.1998).[11] "Healthcare" is defined as "the field concerned with the maintenance or restoration of the health of the body or mind." *Id.* at 882. Based on the language of the statute, a physician who provides indirect care "provide[s] health care as a physician" and is subject to the unrestricted licensing requirement. Lewis does not contend that her duties were unrelated to the provision of health care. Indeed, all of her assignments appear to have involved the provision of health care.[12]

This broader definition is confirmed by the history and structure of the statute. We must assume that the statute was amended in 1999 for a purpose. The evident purpose of the amendment was to impose special requirements for physicians not applicable to other health care professionals. The fact that "health care professionals" generally were not re-

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[11] *Id.* at 1194 (defining "medicine" as "the art or science of restoring or preserving health or due physical condition, as by means of drugs, surgical operations or appliances, or manipulations").

[12] For example, she served in various positions at the Uniformed Services University of the Health Sciences in Bethesda, Maryland, including Acting Vice President in the Office of Recruitment and Minority Affairs; Director, Family Practice Clerkship; Director, University Health Center; Vice Chair, Department of Family Medicine.

quired to have a license unless they were providing "direct patient care" says nothing about the statute's special requirements for physicians. Indeed, the omission of the "direct patient care" language from the special provision applicable to physicians added by the 1999 amendment strongly suggests in and of itself that the license requirement for physicians went beyond direct patient care.

Our interpretation is reinforced by the policy memoranda issued by the Assistant Secretary of Defense for Health Administration to which we owe at least *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). The ASD(HA) is "the principal staff assistant and advisor to the ... Secretary and Deputy Secretary of Defense for all DoD health policies, programs, and activities" and is tasked with "effectively execut[ing] the Department's medical mission." 32 C.F.R. § 367.3 (2005). The ASD(HA)'s memorandum of January 9, 1999, set forth the DoD's view that section 1094(a)(1) requires that "all physicians must have at least one current unrestricted license...." J.A. at 140. The later memorandum acknowledged that "[p]hysicians in purely administrative positions are not unusual," but stated that "[t]he vast majority of these positions are predicated on the knowledge base and credentials unique to physicians," and thus reaffirmed that the licensing requirement applies to these physicians as well. J.A. at 142.

We therefore conclude that Lewis was not denied promotion based on an incorrect interpretation of section 1094.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED

COSTS

No costs.

APPENDIX B

Evelyn L. LEWIS, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 03-2796C.

United States Court of Federal Claims.

July 29, 2005.

MEMORANDUM OPINION AND ORDER

BRADEN, Judge.

FACTUAL BACKGROUND[1]

On June 13, 1983, Plaintiff began active duty as a physician with the United States Navy ("Navy"). *See* AR at 144. Since 1991, Plaintiff held a restricted medical license from the State Oklahoma. *See* Pl.App. at 4-5.

[1] The facts discussed herein are derived from: Plaintiff's September 26, 2000 Complaint ("Compl."); Plaintiff's January 6, 2004 Second Amended Complaint ("Second Amended Compl."); Defendant's Appendix to the January 24, 2005 Statement of Facts ("Gov't App."); the Administrative Record, filed on January 27, 2005 ("AR"); the Appendix to Plaintiff's February 23, 2005 Cross-Motion for Summary Judgment ("Pl.App."); and Plaintiff's February 28, 2005 Third Amended Complaint ("Third Amended Compl.").

On October 17, 1998, Congress enacted the Strom Thurmond National Defense Authorization Act For Fiscal Year 1999, revising the licensing standards for military physicians and requiring every military physician to have an unrestricted medical license. *See* Strom Thurmond National Defense Authorization Act For Fiscal Year 1999, Pub.L. No. 105-261, 112 Stat. 2073 (codified as amended at 10 U.S.C. § 1094(a)(1) (1998)). On January 29, 1999, the Assistant Secretary of Defense for Health Affairs issued a letter outlining this new policy regarding physician licensing that stated: "Unless [the requirement is] waived, all physicians must have at least one current unrestricted license." Gov't App. at 25.

On April 21, 1999, the President nominated Plaintiff for promotion to the rank of Captain and on June 30, 1999, the Senate confirmed her nomination. *See* Gov't App. at 1-3; *see also* 145 CONG. REC. S7966-01 (daily ed. June 30, 1999). Plaintiff's promotion was scheduled to become effective on August 1, 2000. *See* AR at 29. In December 1999, however, the Bureau of Medicine and Surgery directed Plaintiff to show cause for retention in the Navy, because she did not have an unrestricted medical license, as required by the new policy. *See* AR 17-18; *see also* Secretary of the Navy Instruction ("SECNAVINST") 1120.12A (1991) (requiring that every Navy physician have an unrestricted medical license in order to qualify for appointment as an Officer in the Navy Medical Corps).

On May 2, 2000, a Board of Inquiry reviewed Plaintiff's file and unanimously found that: she had not performed in a substandard manner; none of the specified reasons for the board's inquiry warranted separation for cause; and the case should be closed. *See* Gov't App. at 4. Nevertheless, on June 27, 2000, the Chief of Naval Personnel independently determined that Plaintiff was not qualified for promotion and

informed Plaintiff that her promotion would be delayed pending a Final Decision by the Secretary of the Navy. *See* Gov't App. at 6. On March 5, 2002, Plaintiff applied to the Board for Correction of Naval Records ("BCNR"), seeking promotion to the rank of Captain. *See* AR at 27-40. On May 10, 2002, the Secretary of the Navy removed Plaintiff's name from the Fiscal Year 2000 Active Staff Promotion List. *Id.* at 17-18. On February 10, 2003, the BCNR denied Plaintiff's application for relief, based on the 1999 policy requiring that every Department Of Defense ("DOD") physician have a current unrestricted license, as required by SECNAVINST 1120.12A. *Id.* at 12- 13; *see also* Gov't App. at 25. On March 31, 2003, Plaintiff requested a voluntary retirement from active duty. *See* Gov't App. at 17. On January 1, 2004, the Secretary of the Navy granted her request. *Id.* at 19.

PROCEDURAL HISTORY

On September 26, 2000, Plaintiff filed a Complaint in the United States District Court for the District of Columbia alleging that DOD arbitrarily and capriciously issued a regulation that barred her promotion to the rank of Captain. On November 20, 2000, the Government filed a Motion to Dismiss. On August 15, 2001, the United States District Court granted the Government's motion on the basis of non-justiciability and failure to exhaust administrative remedies. *See Lewis v. Rumsfeld*, 154 F.Supp. 2d 56, 57 (D.D.C. 2001). On August 21, 2001, Plaintiff filed a Notice of Appeal. On April 30, 2003, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded, instructing Plaintiff to seek leave of the United States District Court to amend the Complaint to include a damages claims and to transfer the case to the United States Court of Federal Claims. *See Lewis v. Rumsfeld*, No. 01-5296, 2003 WL 21018861 (D.C.Cir. Apr. 30, 2003). On May 6, 2003, Plain-

tiff filed an Amended Complaint and a Motion to Transfer that case to the United States Court of Federal Claims. On June 2, 2003, the United States District Court granted Plaintiff's motion.

On December 12, 2003, the case was assigned to the Honorable Lawrence M. Baksir, who assigned it to the Honorable Eric J. Bruggink for ADR pilot proceedings. On December 19, 2003, Judge Baskir recused himself and reassigned the case to the undersigned judge.

On January 21, 2004, a Second Amended Complaint was filed alleging, as a matter of law, that Plaintiff was promoted to the rank of Captain, or in the alternative, that the BCNR acted arbitrarily and capriciously when it refused to correct Plaintiff's record to show that she was promoted. *See* Second Amended Compl. ¶¶ 21-22. On February 26, 2004, the Government filed a Motion to Stay, pending final resolution of *Dysart v. United States*, No. 02-294C (Fed.Cl. May 5, 2003). On May 6, 2004, the United States Court of Appeals for the Federal Circuit issued that decision. *See Dysart v. United States*, 369 F.3d 1303, 1316 (Fed.Cir. 2004) (holding that the Secretary of the Navy may remove an Officer's name from a promotion list at any time prior to appointment). The appellant advised the court that a petition for a writ of certiorari to the United States Supreme Court would be filed. No petition, however, was filed. On July 8, 2004, the court issued an Order granting the requested stay. On April 12, 2005, the court lifted the stay.

On January 24, 2005, the Government filed a Motion to Dismiss, pursuant to RCFC 12(b)(1), or in the alternative, for Judgment Upon the Administrative Record. On January 27, 2005, the Government filed the Administrative Record. On February 23, 2005, Plaintiff filed a Cross-Motion and Response. On February 28, 2005, a Third Amended Com-

plaint was filed, alleging, as a matter of law, that Plaintiff was promoted to the rank of Captain, or in the alternative, that the BCNR acted arbitrarily and capriciously when it refused to correct Plaintiff's record to show that she was promoted, and seeking active duty pay, allowances, and retired pay of a Captain (O-6). *See* Third Amended Compl. ¶¶ 21-23. On April 8, 2005, the Government filed a Reply thereto. On April 12, 2005, Judge Bruggink ordered the case removed from the ADR process and returned to the undersigned judge for adjudication.

* * *

On April 18, 2005, Plaintiff filed a Sur-Reply.

DISCUSSION

A. Jurisdiction.

The United States Court of Federal Claims has been authorized by Congress to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). In *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed. 2d 607 (1980), however, the United States Supreme Court held that the Tucker Act does not create any substantive right for monetary damages. Therefore, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages in order for the court to have jurisdiction. *See Todd v. United States*, 386 F.3d 1091, 1094 (Fed.Cir.2004) ("[J]urisdiction under the Tucker Act requires

the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act."); *see also Fisher v. United States*, 402 F.3d 1167, 1173-74 (Fed.Cir.2005) (*en banc*) (emphasis in original) (recognizing that *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73, 123 S.Ct. 1126, 155 L.Ed. 2d 40 (2003) articulated a new test that "demands a showing demonstrably lower .... It is enough that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages ... a *fair inference* will do."); *Roth v. United States*, 378 F.3d 1371, 1384 (Fed.Cir.2004) ("Because the Tucker Act itself does not provide a substantive cause of action,... a plaintiff must find elsewhere a money-mandating source upon which to base a suit."); *Khan v. United States*, 201 F.3d 1375, 1377 (Fed.Cir.2000) (quoting *James v. Caldera*, 159 F.3d 573, 580 (Fed.Cir.1998)) ("The plaintiff 'must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.'").

Although the Tucker Act does not provide independent jurisdiction over claims for declaratory or injunctive relief, the court has authority to provide equitable relief if the action is collateral to a claim for monetary damages. *See* 28 U.S.C. § 1491(a)(2)[2]; *see also Brown v. United States*, 105 F.3d 621, 624 (Fed.Cir.1997) ("The Tucker Act does not provide independent jurisdiction over such claims for equitable relief."); *Passaro v. United States*, 774 F.2d 456, 459

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[2] 28 U.S.C. § 1491(a)(2) provides:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

(Fed.Cir.1985) ("Equity, to the extent that it can be administered by the [United States Court of Federal Claims], exists as an incident of general jurisdiction under the Tucker Act[.]").

Plaintiff's Third Amended Complaint properly alleges a money-mandating statute by invoking the Military Pay Act, 37 U.S.C. § 204, since that Act, in relevant part, provides: "a member of the uniform service who is on active duty ... [is] entitled to the basic pay of the pay grade to which assigned." 37 U.S.C. § 204(a); *see also Martinez v. United States*, 333 F.3d 1295, 1303 (Fed.Cir.2003) (*en banc*) ("In the context of military discharge cases, the applicable 'money-mandating' statute that is generally invoked is the Military Pay Act, 37 U.S.C. § 204[.]"). Therefore, the court has jurisdiction to adjudicate the claims alleged in the Third Amended Complaint.

B. Justiciability.

When legal challenges to final military decisions are raised, however, the court is obligated first to consider the justiciability of the legal question presented. *See Orloff v. Willoughby*, 345 U.S. 83, 93-94, 73 S.Ct. 534, 97 L.Ed. 842 (1953) ("[J]udges are not given the task of running the [military]. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates."); *see also Murphy v. United States*, 993 F.2d 871, 873 (Fed.Cir.1993) ("[J]udicial review is only appropriate where the Secretary [of the Navy]'s discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct.").

The United States Court of Appeals for the Federal Circuit specifically has held that determining whether a particular officer merits promotion does not fall within the judicial province. *See Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed.Cir.2002) (holding that the merits of the military's decision not to promote a service member are non-justiciable). Although the merits of a promotion determination are non-justiciable, however, the United States Court of Appeals for the Federal Circuit has recognized that the United States Court of Federal Claims has limited authority to adjudicate a constitutional challenge arising from a procedure used by the Armed Forces. *See Adkins v. United States*, 68 F.3d 1317, 1323 (Fed.Cir.1995) (emphasis in original) ("[A]lthough the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy."); *see also Murphy*, 993 F.2d at 873 ("When the military is given unlimited discretion by Congress, it is nevertheless bound to follow its own procedural regulations if it chooses to implement some."). Therefore, when the Armed Forces have issued a Final Decision, the court can intervene only to ensure that the decision was made in a proper procedural manner. *See Wagner v. United States*, 365 F.3d 1358, 1361 (Fed.Cir.2004) ("[W]e will not disturb the decision of the corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence."); *see also Carmichael v. United States*, 298 F.3d 1367, 1373 (Fed.Cir.2002) ("If the Navy failed to follow its own policies and did not properly provide [plaintiff] with religious accommodation procedures, [plaintiff's] discharge may be involuntary because he was faced with [an] untenable option[.]"); *Murphy*, 993 F.2d at 873-74 (holding that the United States Court of Federal Claims may decide whether the military followed procedures set forth in its own regulations).

C. Standard Of Decision On A Motion To Dismiss For Lack Of Jurisdiction.

In ruling on a motion to dismiss, the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *See Henke v. United States*, 60 F.3d 795, 797 (Fed.Cir.1995) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236-37, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974)); *see also* RCFC 12(b)(1). As the non-moving party, however, plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed.Cir.1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction."). A federal trial court may not grant a motion to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957); *see also Scheuer*, 416 U.S. at 236, 94 S.Ct. 1683 (requiring only that "the allegations of the complaint should be construed favorably to the pleader.").

D. Standard Of Decision For Judgment On The Administrative Record.

The standard of review for Judgment on the Administrative Record, pursuant to RCFC 56.1, is similar but not identical to a motion for summary judgment under RCFC 56(c). *See Bannum, Inc. v. United States*, 404 F.3d 1346, 1355 (Fed.Cir.2005). The standard for a motion for summary judgment is whether the moving party has proved its case as a matter of fact and law or whether a genuine issue of material fact precludes judgment. *See Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). In contrast, the standard for Judgment on the Administrative Record is narrower, i.e., given all the disputed and undisputed facts, whether the plaintiff has met the burden of proof to show that the decision was not in accordance with the law. *See Bannum*, 404 F.3d at 1357 (instructing the court to make "factual findings under RCFC 56.1 from the [limited] record evidence as if it were conducting a trial on the record."). In the case of a final military decision, the review of the Administrative Record is limited to determining whether applicable procedures were followed and the decision is supported by "substantial evidence." *See Heisig v. United States*, 719 F.2d 1153, 1156 (Fed.Cir.1983) ("[C]ourts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence."). Specifically, the court may not retry the case on the merits. *Id.* at 1157.

Armed Forces Board of Correction decisions may be reviewed only to determine whether they are arbitrary and capricious or otherwise contrary to law. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 303, 103 S.Ct. 2362, 76 L.Ed. 2d 586 (1983) ("[Military correction board] decisions are subject to judicial review [by the federal courts] and can be set aside if they are arbitrary, capricious, and not based on substantial evidence."); *Porter v. United States*, 163 F.3d 1304, 1312 (Fed.Cir.1998) ("When called upon to review a decision of a corrections board, or of a Secretary taken upon recommendation from a corrections board, the standard of review is whether the decision is arbitrary, capricious, unsupported by substantial evidence, or contrary to law."). The plaintiff bears the burden of proving such behavior by "cogent and clearly convincing evidence." *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed.Cir.1986). Such proof must also "overcome the strong, but rebuttable, presumption that the administrators of the military, like other public officers, discharge their

duties correctly, lawfully, and in good faith." *Porter*, 163 F.3d at 1316 (quoting Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804, 813 (1979)); *see also Hoffman v. United States*, 894 F.2d 380, 385 (Fed.Cir.1990) (quoting *Guy v. United States*, 221 Ct.Cl. 427, 608 F.2d 867, 870 (1979)) ("Military officers, like other public officials, are presumed to 'discharge their duties correctly, lawfully, and in good faith.'").

E. The United States Court Of Appeals For The Federal Circuit Has Held That A Military Officer Cannot Claim An "Automatic Promotion."

The process for promotion in the Navy is as follows. First, the Secretary of the Navy convenes a Selection Board that recommends Officers between the grades of lieutenant (junior grade) and rear admiral (lower half) for promotion. *See* 10 U.S.C. § 611(a). The Secretary of the Navy then forwards the names to the Joint Chiefs of Staff, if required, and to the Secretary of Defense for transmittal to the President for approval or disapproval. *See* 10 U.S.C. §§ 618(a)-(d).

The President is granted sole authority to appoint military Officers "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56, 2 L.Ed. 60 (1803). Therefore, upon receipt of the Selection Board's report, the President decides whether the Officers listed should be promoted, in the order of seniority:

> [O]fficers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed. Promotions shall be made in the order in which the names of officers appear on the promotion list and after officers previously se-

> lected for promotion in that competitive category have been promoted.

10 U.S.C. § 624(a)(2). Next, the President submits any approved names to the Senate for confirmation. *See* 10 U.S.C. § 629(b). If a name is not confirmed, it is removed from the promotion list. *Id.* The President, however, has absolute discretion to remove an Officer's name from the promotion list. *See Dysart*, 369 F.3d at 1311 ("The constitutional process allows the President complete discretion in choosing whether or not to appoint an officer. The statute does not and cannot alter that process by providing for automatic appointment.").

Once an Officer is confirmed by the Senate, however, the Secretary of the Navy is responsible for setting the date of appointment that establishes the date of promotion to the next highest rank. *See* 10 U.S.C. § 741(d)(2) ("Except as otherwise provided by law, the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade."); *see also* 10 U.S.C. § 624(b)(2). Accordingly, the Secretary of the Navy has authority to issue regulations to delay an Officer's appointment where "there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. § 624(d)(2); *see also* SECNAVINST 1420.1A (providing that the Secretary of the Navy must apply to remove an Officer from a promotion list for any grade below O-7). The Secretary must follow two steps in exercising this authority. First, the Secretary must provide the Officer whose promotion has been delayed with "written notice of the grounds for the delay, unless it is impracticable to give such written notice before the date of the appointment, in which case such written notice shall be given as soon as practicable." 10 U.S.C. § 624(d)(3). Second, the Officer's promotion "may not be delayed under this subsection for more than

six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." 10 U.S.C. § 624(d)(4); *see also* SECNAVINST 1420.1A ¶ 23. The presidential authority to remove the name of any Officer from a list of Officers recommended for promotion is delegated to the Secretary of Defense for grades below rear admiral (lower grade). *See* 3 U.S.C. §§ 301, 302; *see also* 10 U.S.C. § 629(a); Exec. Order No. 12,396, § 1(b), 47 Fed. Reg. 55,897 (Dec. 9, 1982); *Law v. United States*, 11 F.3d 1061, 1067 (Fed. Cir. 1993) (holding that 3 U.S.C. § 302 does not require the President expressly to delegate the authority to deny or affirm the promotion of an Officer).

In this case, the Chief of Naval Personnel determined that Plaintiff was not qualified for promotion because she did not have an unrestricted medical license. *See* Gov't App. at 6. On June 27, 2000, Plaintiff was informed that the Chief of Naval Personnel was delaying her promotion pending a Final Decision by the Secretary of the Navy. *Id.*[3] [FN3] On May 10, 2002, the Secretary of the Navy removed Plaintiff's name from the Fiscal Year 2000 Active Staff Promotion List, denying her promotion. *See* AR at 17-18. The President has complete discretion to take such action and the record does not evidence any procedural deficiencies that would offend constitutional requirements of due process. *See* Dysart, 369 F.3d at 1311-14. Therefore, the court grants the Government's Motion for Judgment on the Administrative Record.

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[3] The record does not address whether Plaintiff asked for a waiver under 10 U.S.C. § 1094(a)(1) or took any steps to obtain an unrestricted license after being notified of the promotion delay.

CONCLUSION

For these reasons, the court has determined that the Government's Motion for Judgment on the Administrative Record is granted. Accordingly, the Government's Motion to Dismiss is moot and Plaintiff's Cross-Motion for Summary Judgment on the Administrative Record is denied. The Clerk of the court is ordered to enter judgment in favor of the Government.

IT IS SO ORDERED.

APPENDIX C

United States Court of Appeals,
Federal Circuit.

Rear Admiral (LH) Noel K. DYSART,
Medical Corps, U.S. Navy (Ret.),
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

No. 03-5106.

Decided: May 26, 2004.

Before RADER, DYK, and PROST, Circuit Judges.

DYK, Circuit Judge.

On June 12, 1998, the President removed appellant Rear Admiral (Lower Half) Noel K. Dysart from the promotion list for the grade of rear admiral in the United States Navy ("Navy"). The appellant filed suit in the Court of Federal Claims, asserting that he had been automatically promoted to that grade as of September 1, 1997, and that he was entitled to the corresponding pay and benefits. In addition, the appellant sought reinstatement to the Navy and asserted a separate claim for medical additional special pay ("MASP"). The Court of Federal Claims granted summary judgment for

the government on the administrative record. *Dysart v. United States,* No. 02-294C (Fed.Cl. May 5, 2003). We affirm.

BACKGROUND

I

This case presents significant questions concerning the appointment process for military officers. The Constitution provides that the President has the authority to nominate and, "by and with the Advice and Consent of the Senate," to appoint "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Three separate actions are ordinarily required for a person to be appointed to office pursuant to this provision: the President's nomination, confirmation by the Senate, and the President's appointment after Senate confirmation. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 155-56, 2 L.Ed. 60 (1803). In accordance with this process, the President first selects a nominee and sends the nomination to the Senate. The Senate acts on the nomination and determines whether or not to confirm the nominee. If the nominee is confirmed, the President appoints the officer and signs a commission or performs some other public act as evidence of the officer's appointment. *See id.* at 157. The Constitution also provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

A naval officer is an "Officer of the United States" in accordance with Article II. *See United States v. Mouat,* 124 U.S. 303, 307, 23 Ct.Cl. 490, 8 S.Ct. 505, 31 L.Ed. 463 (1888) (holding that a naval officer who "holds his place by virtue of an appointment by the president" is an "officer of the United States"). The permanent promotion of a military officer to a higher grade, as well as his initial appointment, is

subject to this constitutional process. *See Weiss v. United States,* 510 U.S. 163, 174, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (holding that "the Appointments Clause [cannot be circumvented] by unilaterally appointing an incumbent to a new and distinct office"), *aff'g* 36 M.J. 224, 227 (C.M.A.1992) ("All regular officers of the military services are appointed by the President and confirmed by the Senate.... Active duty military officers are appointed and confirmed again upon each promotion to a grade above pay grade O-3."); *Shoemaker v. United States,* 147 U.S. 282, 300-01, 13 S.Ct. 361, 37 L.Ed. 170 (1893).[1]

Beginning in 1916, Congress attempted to regularize the promotion process for military officers, including naval officers. In particular, Congress directed the Navy to use a process involving selection boards for promoting naval officers to fill vacancies in the grades of commander, captain, and rear admiral. *See* Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 578-79. Pursuant to the statute, a selection board selected officers in a particular grade to fill vacancies in the next higher grade and submitted a report with its recommendations "to the President for approval or disapproval." *Id.,* 39 Stat. at 579. The selection board process was expanded in 1947 to encompass the promotions of all naval officers to grades above lieutenant (junior grade). *See* Officer Personnel Act of 1947, § 104(a), 61 Stat. 795, 800.

In 1980, the Defense Officer Personnel Management Act ("DOPMA"), Pub.L. No. 96-513, 94 Stat. 2835 (1980), was enacted. DOPMA provides for selection boards, which recommend officers between the grades of lieutenant (junior

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[1] The President has the authority to make temporary appointments and promotions outside of the constitutional process in times of war or national emergency. *See* 10 U.S.C. § 603 (2000).

grade) and rear admiral (lower half)[2] (in the Navy) and first lieutenant and brigadier general (in the Army, Air Force, and Marine Corps) for promotion to the next higher permanent grade. *See* 10 U.S.C. § 611(a) (Supp. I 2001). The board submits its recommendations in a written report to the Secretary of the appropriate military branch. *See* 10 U.S.C. § 617 (2000). After reviewing the report, the Secretary submits the report "to the Secretary of Defense for transmittal to the President for his approval or disapproval." *Id.* § 618(c)(1). The statute also requires the Secretary concerned to place the names of the approved officers within particular categories (called "competitive" categories) on a promotion list in order of their seniority once the President has approved the selection board's report. *See id.* § 624(a)(1). The statute provides:

> [O]fficers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed. Promotions *shall be made* in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

Id. § 624(a)(2) (emphases added).

The statute also provides that the Secretary may prescribe regulations that provide for the delay of an officer's

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[2] DOPMA originally designated this grade as "commodore admiral." *See* § 105, 94 Stat. at 2851. In 1981, the grade was changed to "commodore," *see* Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 405, 95 Stat. 1099, 1105 (1981), and it was again changed to "rear admiral (lower half)" in 1985, *see* Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 514, 99 Stat. 583, 628 (1985).

appointment if "there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." *Id.* § 624(d)(2). Pursuant to this authority, the Secretary has promulgated regulations in paragraph 23 of Secretary of the Navy's Instruction ("Secretary's Instruction") 1420.1A. The statute and regulations impose two limitations on the Secretary's authority to delay an officer's appointment in accordance with subsection 624(d). First, the officer whose appointment has been delayed must be "given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." *Id.* § 624(d)(3). Second, the officer's appointment "may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." *Id.* § 624(d)(4). The regulations include similar provisions. *See* Secretary's Instruction 1420.1A ¶ 23 (1991).

The current statute, like its predecessor, states that appointments are made "by the President, by and with the advice and consent of the Senate," *id.* § 624(c); 10 U.S.C. § 5791 (1976) (repealed 1980).[3] The Navy follows a formal process of nomination, confirmation, and appointment for its officers, apparently designed to take account of the constitutional requirements. In accordance with the statute, the Secretary of the Navy convenes selection boards and approves

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[3] The statute provides that appointments of junior officers--to the grades of lieutenant (junior grade) or lieutenant (in the Navy) and first lieutenant or captain (in the Army, Air Force, and Marine Corps)-- are "made by the President alone." 10 U.S.C. § 624(c). The President has delegated this authority to the Secretary of Defense. *See* Exec. Order No. 12,396, § 1(c), 3 C.F.R. 234 (1983), *reprinted in* 3 U.S.C. § 301 (2000).

their selections. *See* 10 U.S.C. § § 611(a), 618(a). The selections are forwarded to the Chairman of the Joint Chiefs of Staff, if required; the Secretary of Defense; and the President, who may remove names from the recommended list. *See id.* § 618(b)-(d). The President then nominates officers from the recommended list and forwards the nominations to the Senate. *See generally* Department of Defense Instruction 1320.4 (1995) (providing regulations governing the nomination processes of the military branches). If an officer is not confirmed by the Senate, his name must be removed from the promotion list. 10 U.S.C. § 629(b). Once the officer has been confirmed by the Senate, he must next be appointed. For example, when an officer is appointed to the grade of rear admiral, the Special Assistant for Flag Officer Management and Distribution prepares a letter of appointment, which can only be signed with the express approval of the Secretary of the Navy, acting for the President. This letter is issued to the appointee, along with a certificate of appointment. The appointee need not formally accept the appointment, as "[a]n officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. § 626(a). The Secretary concerned determines the date of the appointment, pursuant to 10 U.S.C. § 741(d).[4]

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[4] Section 741(d) provides, in pertinent part:

(1) The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment shall be determined by the Secretary of the military department concerned at the time of such appointment. The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment and who at the time of such appointment was awarded service credit for prior commissioned service or constructive credit for advanced education or training, or special experience shall be determined so as to reflect such prior commissioned service or constructive service. Determinations by

See id. § 624(b)(2).

II

A

In this case, a selection board selected the appellant for promotion to rear admiral in the fall of 1995. The President approved the selection board's recommendation, and the appellant was nominated by the President to be rear admiral on March 20, 1996. *See* 142 Cong. Rec. 5,626 (1996). The appellant was confirmed by the Senate on June 20, 1996, *see* 142 Cong. Rec. 14,827 (1996), and he was placed on the Staff Corps Flag Officer Promotion List with a projected promotion date of September 1, 1997. On January 24, 1997, the Office of the Chief of Naval Operations informed the appellant that the Secretary of the Navy was considering recommending that the appellant's name be removed from the promotion list. The officer who was next in line behind the appellant for promotion to rear admiral was promoted on September 1, 1997. On September 11, 1997, Chief of Naval Personnel notified the appellant that his promotion to the grade of rear admiral was delayed. Two additional officers were promoted to rear admiral on March 1, 1998, and June 1, 1998, respectively.

On September 26, 1997, the Secretary of the Navy recommended that the appellant's name be removed from the promotion list, and the President removed the appellant's name from the promotion list on June 12, 1998, more than

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the Secretary concerned under this paragraph shall be made under regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

(2) Except as otherwise provided by law, the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade.

10 U.S.C. § 741(d)(1)-(2) (Supp. I 2001).

six months after the September 1, 1997, date on which the officer next-in-line to the appellant was promoted.[5] The reasons for the President's removal of the appellant's name from the promotion list need not detain us. In essence, the Secretary of the Navy recommended to the President that the appellant's name be removed because the appellant had received an adverse fitness report from his commanding officer, Vice Admiral Koenig, concerning the conduct of the appellant's relationship with a woman during the period after he had become separated from his wife. As discussed in greater detail below, one question is whether the appellant had automatically been promoted in accordance with subsection 624(a)(2) before the President removed his name from the promotion list. Another is whether the President was obligated to appoint him. Because the Navy viewed him as not promoted, the appellant was required to retire from active duty on February 28, 2002, when he reached the maximum permissible tenure in the grade of rear admiral (lower half).

B

The appellant also submitted a request for MASP to the Chief of the Bureau of Medicine and Surgery on December 4, 1996. MASP is "[a]n entitlement for medical corps officers who agree to remain on active duty for a period of not less than 1 year as computed from the effective date of the [MASP] agreement," provided as additional pay to enhance the retention rate of such officers. Secretary's Instruction 7220.75C ¶ 7 (1990). The appellant sought MASP in the amount of $15,000 for the period from January 1, 1997 to

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[5] The President has the authority to "remove the name of any officer from a list of officers recommended for promotion." 10 U.S.C. § 629(a). He has delegated this authority to the Secretary of Defense, but only for grades below rear admiral (lower half) (in the Navy) and brigadier general (in the Army, Air Force, and Marine Corps). *See* Exec. Order No. 12,396, § 1(b).

December 31, 1997. An officer seeking MASP must "[d]emonstrate an adequate level of military and professional performance as determined and documented by the commanding officer." *Id.* ¶ 7a(1). The appellant's request for MASP was denied, based at least in part on Vice Admiral Koenig's adverse fitness report, on January 13, 1997. The appellant argues that the fitness report was improper and that he is entitled to MASP if the fitness report is held invalid.

C

On March 26, 1998, the appellant applied to the Board for Correction of Naval Records ("Board"), seeking removal of Vice Admiral Koenig's fitness report from his records. The appellant also sought the restoration of his name to the promotion list, promotion to rear admiral effective September 1, 1997, and payment of MASP, arguing that the removal of his name from the promotion list and the denial of MASP were based on the allegedly improper fitness report. On January 29, 2002, the Board recommended that the Secretary of the Navy provide all of the relief sought by the appellant. However, the Assistant Secretary of the Navy for Manpower and Reserve Affairs[6] rejected the Board's recommendation and denied the appellant's requested relief.

On April 8, 2002, the appellant brought suit in the Court of Federal Claims, alleging that he had been automatically promoted to rear admiral as of September 1, 1997. He sought the corresponding pay and benefits of that grade along with the MASP of $15,000 that he had been denied. In addition, because the appellant was required to retire from active duty on February 28, 2002, he sought reinstatement to

[6] The Secretary of the Navy has delegated the responsibility for supervision of the Board to the Assistant Secretary of the Navy for Manpower and Reserve Affairs. *See* 32 C.F.R. § 700.324(b) (2003).

the Navy. The Court of Federal Claims granted the government's motion for summary judgment on the administrative record. The court held that the President's removal of the appellant's name from the promotion list was proper and, therefore, that he had not been promoted by operation of law. *Dysart,* slip op. at 15-16. The court also held that the appellant's claim for MASP was non-justiciable because there was no procedural error in the Navy's denial of MASP. *Id.* at 17-18 (citing *Voge v. United States,* 844 F.2d 776, 779 (Fed.Cir.1988)). The appellant timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal determinations such as the Court of Federal Claims' decision to award summary judgment on the administrative record without deference, applying the same standard of review as the Court of Federal Claims. *Haselrig v. United States,* 333 F.3d 1354, 1355 (Fed.Cir.2003). Accordingly, we must uphold the Secretary's decision denying the appellant's relief unless the Secretary "acted in a manner that is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Id.*

I

The appellant argues that he was promoted by operation of law on September 1, 1997, when the officer next-in-line to him was promoted, and before the President removed his name from the promotion list on June 12, 1998. The appellant recognizes that the statute and regulations provide a mechanism for delaying an appointment, *see* 10 U.S.C. § 624(d); Secretary's Instruction 1420.1A ¶ 23, but he alleges that the attempt to delay his appointment was improper and ineffective under the statute and regulations. First, the appellant argues that the January 24, 1997, letter did not constitute "written notice of the grounds for the delay." 10 U.S.C. §

624(d)(3); Secretary's Instruction 1420.1A ¶ 23c. Second, he argues that the September 11, 1997, letter informing him that his promotion was delayed came after he had already been automatically promoted. Third, he argues that, even if his promotion were properly delayed, it could not have been delayed for more than six months after September 1, 1997, when the officer next-in-line to the appellant was promoted, because the Secretary did not specify any "further period of delay," 10 U.S.C. § 624(d)(4). The government responds with three arguments. First, the government argues that the statute cannot provide for automatic appointments because the appointment power is entirely within the President's discretion. Second, the government argues that the promotion was properly delayed. Finally, the government argues that any violation of section 624(d) was harmless. We need not reach the government's second two arguments because we agree with the first. The constitutional process allows the President complete discretion in choosing whether or not to appoint an officer. The statute does not and cannot alter that process by providing for automatic appointment.

A

1

The constitutional appointment process for Senate-confirmed officers of the United States is most famously described in *Marbury v. Madison.* Under the Constitution, the President is given the authority to appoint officers "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. As noted above, *Marbury* set forth three separate actions that are ordinarily required for a person, subject to Senate confirmation, to be appointed to office: the President's nomination; confirmation by the Senate; and the President's appointment. *See* 5 U.S. (1 Cranch) at 155-56. Each discrete action--nomination, confirmation, and appointment--must be made for a promotion to be effective. As an early opinion of the Attorney General correctly noted:

> To constitute an appointment under [Article II], it is necessary--1st, that the President should nominate the person proposed to be appointed; 2d, that the Senate should advise and consent that the nominee should be appointed; and, 3d, that, in pursuance of such nomination and such advice and consent, the appointment should be actually made.
> The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate, that it should be made sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not divest the executive authority of the discretion to withhold the actual appointment from the nominee. To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being the evidence that the purpose of appointment signified by the nomination has not been changed.

4 Op. Atty. Gen. 217, 219-20 (1843). For judicial officers, such as those involved in *Marbury* itself, the appointment is manifested by the President's signing of a commission. *See also United States v. Le Baron*, 60 U.S. (19 How.) 73, 78, 15 L.Ed. 525 (1856). However, the granting of a commission is not always required for a Presidential appointment. The Court noted that, "[i]n order to determine whether [an officer] is entitled to [a] commission, it becomes necessary to enquire whether he has been appointed to the office." *Marbury*, 5 U.S. (1 Cranch) at 155. The Court ruled:

> The appointment being the sole act of the president,

> must be completely evidenced, when it is shown that he has done every thing to be performed by him.
>
> ....
>
> Some point of time must be taken when the power of the executive over an officer ... must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed.

Id. at 157. In *Marbury,* the "last act to be done by the president" to show that Marbury had in fact been appointed was "the signature of the commission." *Id.* However, the Court noted that, "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer." *Id.* at 156.

The actual process followed with respect to senior military officers follows the constitutional design. The President nominates officers from the promotion list provided to him by the military department, and those officers are confirmed by the Senate.[7] In accordance with the Constitution, the President must then make a public act of appointment for an officer to be promoted.

2

In the case of a promotion to the grade of rear admiral, the final public act of appointment is the signing and issuance of the letter of appointment by the Special Assistant for Flag Officer Management and Distribution on behalf of the

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[7] As noted above, appointments to the grades of lieutenant (junior grade) or lieutenant (in the Navy) and first lieutenant or captain (in the Army, Air Force, and Marine Corps) are "made by the President alone." 10 U.S.C. § 624(c).

President. Although the letter of appointment is typically accompanied by a certificate of appointment, which is the formal document most like a commission for promoted naval officers, the certificate is not required.

"[T]he Special Assistant must have specific authority" from the Secretary of the Navy to sign and issue a letter of appointment. (Supp. Br. for Def.-Appellee at 3.) Although there is apparently no express delegation from the President to the Secretary of the Navy pursuant to 3 U.S.C. § 301 of the authority to appoint naval officers on behalf of the President, such an express delegation is not required for the letter to serve as the public act of appointment required by the Constitution. The statute provides:

> This chapter [3 U.S.C. § 301 *et seq.*] shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

3 U.S.C. § 302. We have previously held that, in view of section 302, the President need not expressly delegate authority. *See Law v. United States*, 11 F.3d 1061, 1067 (Fed.Cir.1993) (holding that the Secretary of Transportation had properly removed a Coast Guard officer's name from a promotion list, even though such authority had not been expressly delegated by the President).

The Supreme Court has assumed that the authority to appoint military officers can be delegated. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 90, 73 S.Ct. 534, 97 L.Ed. 842 (1953) ("It is obvious that the commissioning of officers in

the Army is a matter of discretion within the province of the President as Commander in Chief.... Petitioner, like every conscript, was inducted as a private. To obtain a change of that status requires appointment by *or under authority of* the President." (emphasis added)); *United States v. Moore*, 95 U.S. 760, 762, 24 L.Ed. 588 (1877) ("The place of passed assistant-surgeon is an office, and the *notification by the Secretary of the Navy was a valid appointment to it.*" (emphasis added)).

Our predecessor court addressed the issue more directly in *O'Shea v. United States*, 28 Ct. Cl. 392 (1893). In *O'Shea*, the Secretary of War informed O'Shea on November 21, 1887, "that the President of the United States has appointed you post chaplain in the service of the United States." *Id.* at 398. Nevertheless, another person was nominated for the position and appointed to fill the vacancy on March 5, 1888. *See id.* at 399. O'Shea claimed that he had been appointed to the position by the Secretary of War's letter, and sought pay for the position from November 24, 1887, to March 5, 1888. *See id.* The Court of Claims held that the Secretary of War's letter served as O'Shea's appointment:

> [O'Shea's] appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary [of War] (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made.

Id. at 401. As in *O'Shea*, the letter from the Special Assistant for Flag Officer Management and Distribution expressly states that the appointment is made by the President: "The President of the United States has appointed you to the grade of Rear Admiral (Upper Half) (O-8)." (Supp. Br. for Def.-

Appellee at 2.) Thus, the signing and issuance of a letter of appointment is the final public act for a naval officer to be promoted to rear admiral. The complaint in this case does not allege that a letter of appointment promoting the appellant to rear admiral was signed and issued, and there is no evidence that any such appointment letter was in fact signed and issued.

B

1

However, the appellant contends that he was automatically appointed to the grade of rear admiral by virtue of 10 U.S.C. § 624(a)(2). The statute provides:

> [O]fficers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed. Promotions *shall be made* in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

10 U.S.C. § 624(a)(2) (emphases added). Although section 624(a) refers to the "promotion" of an officer, section 624(b) provides that "[a] regular officer who is promoted under this section *is appointed* in the regular grade to which promoted." *Id.* § 624(b) (emphasis added). In addition, section 624(d) prescribes the procedure for delaying "the appointment of an officer under this section." *Id.* § 624(d). The appellant argues that, pursuant to section 624, his appointment was automatic once he was confirmed by the Senate and a rear admiral position became vacant while his name was at the top of the promotion list. However, the language of the statute does not provide for automatic appointment without action by the President. Rather, the statute provides that ap-

pointments are made "by the President, by and with the advice and consent of the Senate." *Id.* § 624(c); *see also* U.S. Const. art. II, § 2, cl. 2.

Nor does the legislative history provide any reason here to believe that Congress intended the statute to provide for automatic appointments. Both the House and Senate reports focus on providing uniform promotion procedures for all branches of the armed forces. *See, e.g.*, H.R. Rep. No. 96-1462, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6334 (stating that the bill was meant to "[p]rovide uniform laws for promotion procedures for officers in the separate services"); S. Rep. No. 96-375, at 1 (1979) (stating that the bill was meant to "[p]rovide uniform laws governing officer promotions in each military service"). Neither report discusses an attempt to ensure that those officers placed on promotion lists would automatically be appointed as part of such a uniform statutory scheme. In addition, the House Report states that the bill was intended to "provide common general authority for the permanent appointment of officers *by the President* with the advice and consent of the Senate." H.R. Rep. No. 96-1462, at 36, *reprinted in* 1980 U.S.C.C.A.N. at 6367 (emphasis added). Therefore, the legislative history does not show that Congress intended to provide for automatic appointments.

In any event, Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic appointments. The limited role for Congress in the appointment process is specified in the Constitution itself, which provides only that Congress may vary the process for "inferior Officers." U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). Protecting the role of the President in the ap-

pointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention. *See Buckley v. Valeo*, 424 U.S. 1, 128-31, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *see also Weiss*, 510 U.S. at 184-87, 114 S.Ct. 752 (Souter, J., concurring); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883-85, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991).

In *Buckley*, the Court considered the constitutionality of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1280-81, which provided for a Federal Election Commission composed of six voting members, two of whom were to be appointed by the President pro tempore of the Senate, and two of whom were to be appointed by the Speaker of the House of Representatives. *See Buckley*, 424 U.S. at 126, 96 S.Ct. 612. The Court held this provision unconstitutional because the members of the commission, who qualified as officers of the United States, were not appointed pursuant to the constitutional appointment process. *See id.* ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].").

Similarly, the Court in *Springer v. Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845 (1928), considered Congress's attempt in the Organic Act, ch. 416, 39 Stat. 545 (1916), to create a government for the Philippine Islands in which the legislative branch had the power to "provide for the appointment and removal of the heads of the executive departments by the Governor General." *Springer*, 277 U.S. at 201, 48 S.Ct. 480 (quoting Organic Act, ch. 416, § 22, 39 Stat. 545, 553 (1916)). The Court held this provision unconstitutional, stating: "It may be stated ..., as a general rule inherent in the American constitutional system, that, unless

otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise ... executive ... power." *Id.* The Court further ruled: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or *appoint the agents charged with the duty of such enforcement.* The latter are executive functions." *Id.* at 202, 48 S.Ct. 480 (emphasis added). The Court has consistently prohibited attempts by Congress to exercise the appointment power, which properly lies with the President, holding that, "while Congress may create an office, it cannot appoint the officer." *Weiss,* 510 U.S. at 174, 114 S.Ct. 752 (quoting *Shoemaker,* 147 U.S. at 300, 13 S.Ct. 361). Thus, military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute.[8]

2

Finally, even though the statute cannot provide for automatic appointments, we must consider whether the statute can be read as compelling appointment in accordance with the statutory scheme.

In general, the subject of military promotions is beyond the competence of courts to review. *See, e.g., Orloff,* 345 U.S. at 91, 73 S.Ct. 534; *Adkins v. United States,* 68 F.3d 1317, 1324 (Fed.Cir.1995) ("Courts will not interject themselves into the promotion process."). However, the Military Pay Act, 37 U.S.C. § 204 (2000), provides for suit in the Court of Federal Claims when the military, in violation of

[8] Although Congress may permissibly change an officer's pay and direct that an officer be paid as though he had been appointed to a higher grade, it cannot change an officer's grade, which requires an appointment. *See Wood v. United States,* 107 U.S. (17 Otto) 414, 417, 18 Ct. Cl. 761, 2 S.Ct. 551, 27 L.Ed. 542 (1882).

the Constitution, a statute, or a regulation, has denied military pay. *See, e.g., Holley v. United States,* 124 F.3d 1462, 1465 (Fed.Cir.1997); *Sanders v. United States,* 219 Ct. Cl. 285, 594 F.2d 804, 810-11 (1979) (*en banc*). The Corrections Board statute, 10 U.S.C. § 1552, provides for correction of military records if a promotion has been improperly denied (and for the convening of special selection boards in appropriate cases to determine whether the officer should be promoted), and for judicial review of the Board's decision. *See Richey v. United States,* 322 F.3d 1317, 1323-25 (Fed.Cir.2003); *Porter v. United States,* 163 F.3d 1304, 1311-12 (Fed.Cir.1998); *Sanders,* 594 F.2d at 810- 11; *see also Adkins,* 68 F.3d at 1326; *Law,* 11 F.3d at 1064. Because the Military Pay Act is a money-mandating statute, the general rule "that one is not entitled to the benefit of a position until he has been duly appointed to it," *United States v. Testan,* 424 U.S. 392, 402, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), is inapplicable.[9] In such cases, redress may be afforded for a promotion improperly denied. It is apparently assumed that the constitutionally-mandated steps in the appointment process--nomination, confirmation, and actual appointment--would be followed absent improper action by subordinate officials, and that the rare exercise of Presidential (or Senate) discretion not to make the appointment creates no Article III bar to the action in the Court of Federal Claims. *See Glidden Co. v. Zdanok,* 370 U.S. 530, 568-71, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *see also Chicago & S. Air Lines v.*

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[9] *Testan* prohibited a claim for retroactive benefits pursuant to the Classification Act, 5 U.S.C. § 5101 *et seq.* (2000), which the Court held was not money-mandating, as is required for the Court of Federal Claims to take jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491 (2000). 424 U.S. at 399-400, 96 S.Ct. 948. The Court held that, because the Classification Act was not money-mandating, it did not alter the "established rule ... that one is not entitled to the benefit of a position until he has been duly appointed to it." *Id.* at 402, 96 S.Ct. 948. Unlike *Testan,* there is a money-mandating statute here--the Military Pay Act.

Waterman S.S. Corp., 333 U.S. 103, 113-14, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

The appellant argues that the Secretary's action here, declining to follow the Board's decision recommending his promotion, is contrary to law. This case, however, is fundamentally different from the cases on which the appellant relies. The appointment was not derailed as a result of action by a subordinate official acting in his own authority, but by the President, who decided not to make the appointment. Such action by the President or an officer acting for the President is simply unreviewable. *See, e.g., Orloff,* 345 U.S. at 92, 73 S.Ct. 534; *Curry v. United States,* 221 Ct. Cl. 741, 609 F.2d 980, 983 (Ct. Cl.1979); *Cooper v. United States,* 203 Ct. Cl. 300, 303 (1973); *D'Arco v. United States,* 194 Ct. Cl. 811, 441 F.2d 1173, 1175 (1971).

The Constitution contemplates that, after confirmation, the President may refuse to execute the appointment. All Presidential appointments, particularly those to senior positions, involve a discretionary decision. What the Supreme Court has said with respect to appointments generally applies particularly in this context:

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

Keim v. United States, 177 U.S. 290, 293, 35 Ct. Cl. 628, 20 S.Ct. 574, 44 L.Ed. 774 (1900). Our predecessor court has specifically held that the President or an officer acting for

him may remove an officer's name from a promotion list "at any time before the appointment is consummated." *D'Arco,* 441 F.2d at 1175. In *D'Arco,* the Secretary of the Navy, acting for the President, removed D'Arco's name from a promotion list after he had been confirmed by the Senate. *Id.* at 1174. The Court of Claims upheld this action, holding that, in accordance with *Marbury,* the President (and the Secretary acting for the President) "could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission." *Id.* at 1175; *see also Doggett v. United States,* 207 Ct. Cl. 478, 482 (1975) ("We believe that in the absence of any contrary requirement, a power ... to recommend a promotion, implies a power to withdraw the recommendation *at any time before it is acted on.*" (emphasis added)).

The current statutory language itself does not clearly compel the President to appoint military officers. As the appellant notes, the statute provides that officers "*shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. § 624(a)(2) (emphasis added); *see also* S. Rep. No. 96-375, at 21 ("[A]fter confirmation by the Senate and unless a promotion is delayed for good reason, *promotions shall be made* to fill vacancies in order of seniority." (emphasis added)).

This language contrasts with the language of the previous statute, which provided that "[t]he President *may fill vacancies* in any grade in the line of the Regular Navy" in accordance with the statutory provisions. 10 U.S.C. § 5780 (1976) (repealed 1980) (emphasis added). Our predecessor court interpreted the previous statute's language in *D'Arco* as permitting the President to remove an officer's name from a promotion list "at any time before the appointment is consummated." 441 F.2d at 1175; *see also Doggett,* 207 Ct. Cl. at 482. In *D'Arco,* the court held that the provision that

"[t]he President may terminate any temporary appointment," 10 U.S.C. § 5779 (1964) (repealed 1980), permitted the President (or the Secretary acting for the President) to withhold a commission. 441 F.2d at 1175.

Although DOPMA changed the statutory language, there is no indication in the legislative history that Congress intended to cabin the President's authority or to overrule our predecessor court's decision in *D'Arco*. As noted above, the House Report states that the bill was intended to "provide common general authority for the permanent appointment of officers by the President with the advice and consent of the Senate." H.R. Rep. No. 96-1462, at 36 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6367. Indeed, the statute provides that "[t]he President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter." 10 U.S.C. § 629(a). In any event, Congress does not have the authority to require the President to exercise his appointment power; such authority would be akin to an exercise by Congress of the appointment power itself, which is prohibited.

Nor does the judiciary have a role in reviewing such decisions. The President's decision not to appoint is a discretionary act that cannot be reviewed by a court. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 165-67. In *Marbury*, the Court held that it could not review the President's exercise of his appointment power because it is discretionary: "The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion." *Id.* at 166-67. Similarly, the Court in *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), held that it could not review the President's discretionary determination of which military bases to close pursuant to the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. §

2687, even if subordinate officials had failed to comply with legal requirements. *Id.* at 476-77, 114 S.Ct. 1719. The Court held: "Where a statute ... commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." *Id.* at 477, 114 S.Ct. 1719. The same is necessarily true where the President is afforded discretion by the Constitution itself. The President's decision here whether or not to exercise his appointment power is discretionary, and we hold that the President cannot be compelled to appoint military officers.

Therefore, the appellant was never appointed to the grade of rear admiral, and we cannot review the President's decision not to appoint him. Because he was never appointed, the appellant is not entitled to the pay and benefits he would have received if he had been promoted to that grade. We therefore affirm the Court of Federal Claims' denial of that relief.

II

Finally, the appellant contends that he is entitled to $15,000 of MASP because the pay was denied on the basis of Vice Admiral Koenig's improper fitness report. However, that issue is not justiciable. The Court of Federal Claims may only review a denial of MASP "for compliance with established procedures"; it may not review "the substantive merits of the decision." *Voge,* 844 F.2d at 779. In *Voge,* we held that "there are no tests or standards for the court to apply in determining whether the decision to terminate [M]ASP is correct. Instead, Congress provided only that the determination to deny [M]ASP may be made 'at any time' by the Secretary." *Id.* at 780 (quoting 37 U.S.C. § 302(c)(2)) (citations omitted). The appellant argues that Vice Admiral Koenig violated regulations in formulating the fitness report, but he does not contend that the Secretary violated established procedures in denying MASP. Therefore, the Court of

Federal Claims correctly held that it could not review the Secretary's decision to deny the appellant's request for MASP because the issue was not justiciable. Accordingly, the court's denial of the appellant's claim for MASP is affirmed.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED.

COSTS

No costs.

APPENDIX D

EVELYN L. LEWIS, Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee.

05-5155

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

October 26, 2006, Decided
October 26, 2006, Filed

OPINION:

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 2, 2006.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

The relevant sections of DOPMA are codified at 10 U.S.C. §§ 611, 618, 624, 629, and 741, as follows:

§ 611. Convening of selection boards

(a) Whenever the needs of the service require, the Secretary of the military department concerned shall convene selection boards to recommend for promotion to the next higher permanent grade, under subchapter II of this chapter, officers on the active-duty list in each permanent grade from first lieutenant through brigadier general in the Army, Air Force, or Marine Corps and from lieutenant (junior grade) through rear admiral (lower half) in the Navy. The preceding sentence does not require the convening of a selection board in the case of officers in the permanent grade of first lieutenant or, in the case of the Navy, lieutenant (junior grade) when the Secretary concerned recommends for promotion to the next higher grade under section 624(a)(3) of this title all such officers whom the Secretary finds to be fully qualified for promotion.

(b) Whenever the needs of the service require, the Secretary of the military department concerned may convene selection boards to recommend officers for continuation on active duty under section 637 of this title or for early retirement under section 638 of this title.

(c) The convening of selection boards under subsections (a) and (b) shall be under regulations prescribed by the Secretary of Defense.

§ 618. Action on reports of selection boards

(a)(1) Upon receipt of the report of a selection board submitted to him under section 617(a) of this title, the Secretary of the military department concerned shall review the report to determine whether the board has acted contrary to law or regulation or to guidelines furnished the board under section 615(b) of this title. Following such review, unless the Secretary concerned makes a determination as described in paragraph (2), the Secretary shall submit the report as required by subsection (b) or (c), as appropriate.

(2) If, on the basis of a review of the report under paragraph (1), the Secretary of the military department concerned determines that the board acted contrary to law or regulation or to guidelines furnished the board under section 615(b) of this title, the Secretary shall return the report, together with a written explanation of the basis for such determination, to the board for further proceedings. Upon receipt of a report returned by the Secretary concerned under this paragraph, the selection board (or a subsequent selection board convened under section 611(a) of this title for the same grade and competitive category) shall conduct such proceedings as may be necessary in order to revise the report to be consistent with law, regulation, and such guidelines and shall resubmit the report, as revised, to the Secretary in accordance with section 617 of this title.

(b)(1) After completing the requirements of subsection (a), the Secretary concerned, in the case of the report of a selection board that considered officers who are serving, or have

served, in joint duty assignments, shall submit the report to the Chairman of the Joint Chiefs of Staff.

(2) The Chairman, in accordance with guidelines furnished to the Chairman by the Secretary of Defense, shall review the report for the purpose of determining if--

(A) the selection board acted consistent with the guidelines of the Secretary of Defense under section 615(c) of this title to ensure that selection boards give appropriate consideration to the performance in joint duty assignments of officers who are serving, or have served, in such assignments; and

(B) the selection board otherwise gave appropriate consideration to the performance in joint duty assignments of officers who are serving, or have served, in such assignments.

(3) After reviewing the report, the Chairman shall return the report, with his determinations and comments, to the Secretary concerned.

(4) If the Chairman determines that the board acted contrary to the guidelines of the Secretary of Defense under section 615(c) of this title or otherwise failed to give appropriate consideration to the performance of officers in joint duty assignments, the Secretary concerned may--

(A) return the report, together with the Chairman's determinations and comments, to the selection board (or a subsequent selection board convened under section 611(a) of this title for the same grade and competitive category) for further proceedings in accordance with subsection (a);

(B) convene a special selection board in the manner provided for under section 628 of this title; or

(C) take other appropriate action to satisfy the concerns of the Chairman.

(5) If, after completion of all actions taken under paragraph (4), the Secretary concerned and the Chairman remain in disagreement with respect to the report of a selection board, the Secretary concerned shall indicate such disagreement, and the reasons for such disagreement, as part of his transmittal of the report of the selection board to the Secretary of Defense under subsection (c). Such transmittal shall include any comments submitted by the Chairman.

(c)(1) After his final review of the report of a selection board, the Secretary concerned shall submit the report, with his recommendations thereon, to the Secretary of Defense for transmittal to the President for his approval or disapproval. The Secretary of Defense shall, before transmitting the report of a selection board to the President, take appropriate action to resolve any disagreement between the Secretary concerned and the Chairman transmitted to him under subsection (b)(5). If the authority of the President under this paragraph to approve or disapprove the report of a selection board is delegated to the Secretary of Defense, it may not be redelegated except to an official in the Office of the Secretary of Defense.

(2) If the report of a selection board names an officer as having a record which indicates that the officer should be required to show cause for his retention on active duty, the Secretary concerned may provide for the review of the record of that officer as provided for under regulations prescribed under section 1181 of this title.

(d) The name of an officer recommended for promotion by a selection board may be removed from the report of the selection board only by the President.

(e)(1) The names of the officers recommended for promotion in the report of a selection board shall be disseminated to the armed force concerned as follows:

(A) In the case of officers recommended for promotion to a grade below brigadier general or rear admiral (lower half), such names may be disseminated upon, or at any time after, the transmittal of the report to the President.

(B) In the case of officers recommended for promotion to a grade above colonel or, in the case of the Navy, captain, such names may be disseminated upon, or at any time after, the approval of the report by the President.

(C) In the case of officers whose names have not been sooner disseminated, such names shall be promptly disseminated upon confirmation by the Senate.

(2) A list of names of officers disseminated under paragraph (1) may not include--

(A) any name removed by the President from the report of the selection board containing that name, if dissemination is under the authority of subparagraph (B) of such paragraph; or

(B) the name of any officer whose promotion the Senate failed to confirm, if dissemination is under the authority of subparagraph (C) of such paragraph.

(f) Except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of

this title may not be disclosed to any person not a member of the board.

(g) If the Secretary of a military department or the Secretary of Defense makes a recommendation under this section that the name of an officer be removed from a report of a selection board and the recommendation is accompanied by information that was not presented to that selection board, that information shall be made available to that officer. The officer shall then be afforded a reasonable opportunity to submit comments on that information to the officials making the recommendation and the officials reviewing the recommendation. If an eligible officer cannot be given access to such information because of its classification status, the officer shall, to the maximum extent practicable, be provided with an appropriate summary of the information.

§ 624. Pro motions: how made

(a)(1) When the report of a selection board convened under section 611(a) of this title is approved by the President, the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a single list for that competitive category, to be known as a promotion list, in the order of the seniority of such officers on the active-duty list.

(2) Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed. Promotions shall be made in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted. Officers to be promoted to the grade of first lieutenant or lieutenant (junior grade) shall be promoted in accor-

dance with regulations prescribed by the Secretary concerned.

(3)(A) Except as provided in subsection (d), officers on the active-duty list in the grade of first lieutenant or, in the case of the Navy, lieutenant (junior grade) who are on an approved all-fully-qualified-officers list shall be promoted to the next higher grade in accordance with regulations prescribed by the Secretary concerned.

(B) An all-fully-qualified-officers list shall be considered to be approved for purposes of subparagraph (A) when the list is approved by the President. When so approved, such a list shall be treated in the same manner as a promotion list under this chapter.

(C) The Secretary of a military department may make a recommendation to the President for approval of an all-fully-qualified-officers list only when the Secretary determines that all officers on the list are needed in the next higher grade to accomplish mission objectives.

(D) For purposes of this paragraph, an all-fully-qualified-officers list is a list of all officers on the active-duty list in a grade who the Secretary of the military department concerned determines--

(i) are fully qualified for promotion to the next higher grade; and

(ii) would be eligible for consideration for promotion to the next higher grade by a selection board convened under section 611(a) of this title upon the convening of such a board.

(b)(1) A regular officer who is promoted under this section is appointed in the regular grade to which promoted and a reserve officer who is promoted under this section is appointed in the reserve grade to which promoted.

(2) The date of rank of an officer appointed to a higher grade under this section is determined under section 741(d) of this title.

(c) Appointments under this section shall be made by the President, by and with the advice and consent of the Senate, except that appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(d)(1) Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if--

(A) sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of;

(B) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

(C) a board of officers has been convened under chapter 60 of this title to review the record of the officer; or

(D) a criminal proceeding in a Federal or State court is pending against the officer.

If no disciplinary action is taken against the officer, if the charges against the officer are withdrawn or dismissed, if the officer is not ordered removed from active duty by the Secretary concerned under chapter 60 of this title, or if the officer is acquitted of the charges brought against him, as the case may be, then unless action to delay an appointment has also been taken under paragraph (2) the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(2) Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may also be delayed in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion. If the Secretary concerned later determines that the officer is qualified for promotion to such grade, the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and the officer shall, upon such promotion, have the same date of rank, the same effective date for pay and allowances in the higher grade to which appointed, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary

makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(3) The appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary.

(4) An appointment of an officer may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay. An officer's appointment may not be delayed more than 90 days after final action has been taken in any criminal case against such officer in a Federal or State court, more than 90 days after final action has been taken in any court-martial case against such officer, or more than 18 months after the date on which such officer would otherwise have been appointed, whichever is later.

§ 629. Re moval from a list of officers recommended for promotion

(a) The President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter.

(b) If, after consideration of a list of officers approved for promotion by the President, the Senate does not give its advice and consent to the appointment of an officer whose name is on the list, that officer's name shall be removed from the list.

(c)(1) An officer whose name is removed from a list under subsection (a) or (b) continues to be eligible for consideration for promotion. If he is recommended for promotion by the next selection board convened for his grade and competitive category and he is promoted, the Secretary of the military department concerned may, upon such promotion, grant him the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if his name had not been so removed.

(2) If such an officer who is in a grade below the grade of colonel or, in the case of the Navy, captain is not recommended for promotion by the next selection board convened for his grade and competitive category, or if his name is again removed from the list of officers recommended for promotion, or if the Senate again does not give its advice and consent to his promotion, he shall be considered for all purposes to have twice failed of selection for promotion.

§ 741. Rank: commissioned officers of the armed forces

(a) Among the grades listed below, the grades of general and admiral are equivalent and are senior to other grades and the grades of second lieutenant and ensign are equivalent and are junior to other grades. Intermediate grades rank in the order listed as follows:

Army, Air Force, and Marine Corps	Navy and Coast Guard
General	Admiral.
Lieutenant general	Vice admiral.
Major general	Rear admiral.
Brigadier general	Rear admiral (lower half).
Colonel	Captain.
Lieutenant colonel	Commander.
Major	Lieutenant commander.
Captain	Lieutenant.
First lieutenant	Lieutenant (junior grade).
Second lieutenant	Ensign.

(b) Rank among officers of the same grade or of equivalent grades is determined by comparing dates of rank. An officer whose date of rank is earlier than the date of rank of another officer of the same or equivalent grade is senior to that officer.

(c) Rank among officers of the Army, Navy, Air Force, and Marine Corps of the same grade or of equivalent grades who have the same date of rank is determined by regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

(d)(1) The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment shall be determined by the Secretary of the military department concerned at the time of such appointment. The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment and who at the time of such appointment was awarded service credit for prior commissioned service or constructive credit for advanced education

or training, or special experience shall be determined so as to reflect such prior commissioned service or constructive service. Determinations by the Secretary concerned under this paragraph shall be made under regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

(2) Except as otherwise provided by law, the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade.

(3) Under regulations prescribed by the Secretary of Defense, which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps, the date of rank of a reserve commissioned officer (other than a warrant officer) of the Army, Navy, Air Force, or Marine Corps who is to be placed on the active-duty list and who has not been on continuous active duty since his original appointment as a reserve commissioned officer in a grade above chief warrant officer, W-5, or who is transferred from an inactive status to an active status and placed on the active-duty list or the reserve active-status list may, effective on the date on which he is placed on the active-duty list or reserve active-status list, be changed by the Secretary concerned to a later date to reflect such officer's qualifications and experience. The authority to change the date of rank of a reserve officer who is placed on the active-duty list to a later date does not apply in the case of an officer who (A) has served continuously in the Selected Reserve of the Ready Reserve since the officer's last promotion, or (B) is placed on the active-duty list while on a promotion list as described in section 14317(b) of this title.

(4)(A) The Secretary concerned may adjust the date of rank of an officer appointed under section 624(a) of this title to a higher grade that is not a general officer or flag officer grade if the appointment of that officer to that grade is de-

layed from the date on which (as determined by the Secretary) it would otherwise have been made by reason of unusual circumstances (as determined by the Secretary) that cause an unintended delay in--

(i) the processing or approval of the report of the selection board recommending the appointment of that officer to that grade; or

(ii) the processing or approval of the promotion list established on the basis of that report.

(B) The adjusted date of rank applicable to the grade of an officer under subparagraph (A) shall be consistent--

(i) with the officer's position on the promotion list for that grade and competitive category when additional officers in that grade and competitive category were needed; and

(ii) with compliance with the applicable authorized strengths for officers in that grade and competitive category.

(C) The adjusted date of rank applicable to the grade of an officer under subparagraph (A) shall be the effective date for--

(i) the officer's pay and allowances for that grade; and

(ii) the officer's position on the active-duty list.

(D) When under subparagraph (A) the Secretary concerned adjusts the date of rank of an officer in a grade to which the officer was appointed by and with the advice and consent of the Senate and the adjustment is to a date before the date of the advice and consent of the Senate to that appointment, the Secretary shall promptly transmit to the Committee on Armed Services of the Senate a notification of

that adjustment. Any such notification shall include the name of the officer and a discussion of the reasons for the adjustment of date of rank.

(E) Any adjustment in date of rank under this paragraph shall be made under regulations prescribed by the Secretary of Defense, which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

APPENDIX F

REGULATORY PROVISION INVOLVED

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, DC 20350-1000

SECNAVINST 1420.1A
NMPC-22
8 January 1991

SECNAV INSTRUCTION 1420.1A

From: Secretary of the Navy
To: All Ships and Stations

Subj: PROMOTION AND SELECTIVE EARLY RETIREMENT OF COMMISSIONED OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND MARINE CORPS

Ref: (a) Title 10 United States Code (NOTAL)
(b) DoD Directive 1320.12 of 3 Jun 87 (NOTAL)
(c) DoD Directive 1320.7 of 27 Jul 81 (NOTAL)
(d) SECNAVINIST 1427.2A
(e) SECNAVINST 1400.1A
(f) SECNAV INST 1920.7
(g) SECNAVINST 1401.3
(h) SECNAVINST 1920.6A
(i) SECNAVINST 1900.7F

1. **Purpose.** To revise policy and procedures for permanent promotion and selective early retirement of commissioned officers 0-2 and above, except limited duty officers on the active-duty lists of the Navy and Marine Corps in compli-

ance with references (a), (b), and (c). This instruction is a complete revision and should be reviewed in its entirety.

2. **Cancellation.** SECNAVINST 1420.1.

3. **Applicability**

a. This instruction applies to all commissioned officers, 0-2 and above, except limited duty officers on the active-duty lists of the Navy and Marine Corps, as defined by sections 620 and 641 of reference (a) and implemented in reference (d).

b. SECNAVINST 1412.6J governs promotion of officers on the active-duty lists of the Navy or Marine Corps in the grade of ensign or second lieutenant.

c. SECNAVINST 1412.8 (NOTAL) governs the promotion of limited duty officers on active duty in the Navy and chief warrant officers on active duty in the Navy.

d. SECNAVINST 1412.9A (NOTAL) governs the promotion and continuation of limited duty officers and warrant officers in the Regular Marine Corps and warrant officers in the Marine Corps Reserve.

e. SECNAVINST 1421.3G (NOTAL) governs temporary (SPOT) promotion of officers in the Navy to lieutenant commander.

4. **Policy.** Department of the Navy (DON) policy is to meet skill and experience requirements for officers in each grade and competitive category established in reference (e) by using a system of competitive selection boards.

a. The promotion system is based on five-year plans designed to meet the following objectives:

(1) Select numbers of officers to fill projected vacancies to meet authorized strength in each competitive category and grade for the first fiscal year of the plan.

(2) Ensure reasonable career opportunities in each competitive category.

(3) Attain and maintain an all Regular Force on the active-duty list in the grades of 0-4 and above.

(4) Maintain programmed requirements by grade in each competitive category over the latter 4 fiscal years of the plan while maintaining relatively similar career opportunities.

b. Boards of experienced officers will provide a collective judgment and opinion on the quality of officers eligible for promotion. Promotion boards will be administered to ensure careful consideration of all eligible officers.

5. **Annual Promotion Plan.** The Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) shall submit to the Secretary of the Navy (SECNAV), via the Judge Advocate General (JAG), annually, a five-year promotion plan. The plan must be submitted 45 days before the proposed convening date of the first promotion board of the fiscal year promotion cycle.

a. The plan will provide an estimate of the number of officers needed in each grade and competitive category to attain authorized strength; the number of officers estimated to be serving in each competitive category for each grade; the number of officers authorized to be on active duty on the lat

day of each fiscal year for each grade, including the controlled grades as established in section 523 of reference (a); and a recommended promotion opportunity and projected flow point for each grade and competitive category. The proposed plan will also show the number of officers to be placed in the promotion zone for each grade in each competitive category; the number of officers to be selected for each grade and competitive category to attain the proposed promotion opportunity, and any proposed below zone opportunity.

b. The plan will provide rationale, and analysis as necessary, to support proposed deviations from the flow points and opportunity guidelines in paragraph 11 or proposed below-zone opportunity exceeding 10 percent for grades 0-4 and above. Plans proposing below zone opportunity greater than 10 percent shall be accompanied by a request for the Secretary of Defenses (SECDEF) approval of such opportunity. By law, plans may not propose below zone opportunity greater than 15 percent.

c. The plan should identify any expected need for selective continuation of officers under reference (f) or selective early retirement under paragraph 24, to aid in meeting strength, opportunity, or promotion flow points. Selective early retirement and selective continuation plans will be submitted as soon after the annual plan as feasible.

6. **Eligibility for Consideration for Promotion**

a. Commissioned officers who are on the active-duty list of the Navy or Marine Corps and who meet prescribed service-in-grade requirements are eligible for consideration by active duty promotion selection boards, except as provided in paragraphs 6b, 6d, 7, 10c, 18b, and 19d.

b. As provided in section 619 of reference (a), active-duty list promotion selection boards may not consider an officer whose name is on a promotion list for the next higher grade.

c. Officers who enter on active duty and are on the active-duty list on the date the board convenes will be eligible for consideration for promotion under this instruction unless eligibility is deferred under paragraph 7.

d. Officers placed on the active-duty list after the date a board convenes are not eligible for consideration by that board.

e. In the Judge Advocate General's Corps and Chaplain Corps, normal promotion flow for newly appointed officers is impeded when officers who are granted sufficient entry grade credit to provide for initial appointment in the grade of lieutenant (junior grade) and are eligible for consideration, commence active duty after the annual lieutenant selection board convenes. To avoid this impediment, annual promotion plans will provide for two lieutenant selection boards for the Judge Advocate General's Corps and Chaplain Corps each year.

7. **Deferred Eligibility.** Deferment of eligibility is intended to provide officers who otherwise would have been in zone or above zone an opportunity to obtain active-duty experience, qualifications and significant evaluation before being considered by a promotion board. Officers whose promotion eligibility is deferred will be considered as officers in, above, or below the promotion zone, as appropriate, as if their eligibility had not been deferred. Eligibility will be deferred as follows:

a. **Marine Corps Officers.** The CMC may, with the officer's consent or at his or her request, at any time prior to the

convening of the first selection board to consider his or her records defer the officer's eligibility for consideration in zone or above zone for promotion up to one year from the date the officer entered on active duty and was subject to placement on the active-duty list. An officer's written request for deferment must be submitted to the Commandant of the Marine Corps, Headquarters United States Marine Corps, (MMPR-1), Washington DC 20380-0001. Requests must arrive no later than the convening of the selection board before which the officer would normally be eligible.

b. **Navy Officers.** Except for appointees in the Judge Advocate General's Corps and Chaplain Corps, appointees whose placement on the active-duty list would make them eligible for consideration by a promotion board within one year of entering on active duty and being subject to placement on the active-duty list, shall be informed that their eligibility for consideration for promotion will be deferred unless they specifically request consideration. The appointee may waive this deferment and request consideration for promotion, in writing, to Commander, Naval Military Personnel Command (COMNAVMILPERSCOM) (NMPC-22), Navy Department, Washington DC 20370-5220. The request must be received by NMPC-22 no later than the convening of the board. The Chief of Naval Personnel (CHNAVPERS) shall normally place such officers' records before the promotion board.

c. **Judge Advocate General's Corps and Chaplain Corps Officers.** Deferred eligibility is not automatic for Judge Advocate General's Corps and Chaplain Corps officers eligible for lieutenant boards under paragraph 6e. These officers may, however, request deferment before the first regularly scheduled promotion board which would normally consider them. The officers may request deferment, in writing, to COMNAVMILPERSCOM (NMPC-22), Navy De-

partment, Washington DC 20370-5220, to arrive no later than the convening of the board before which deferment is requested. The CHNAVPERS shall normally defer eligibility of officers who request it under this paragraph.

d. **Reinstatement.** An eligibility deferral, waived under paragraph 7a or 7b, will not be reinstated.

8. **Service-in-Grade.** In the annual promotion plan, SECNAV will prescribe, under Section 619 of reference (a), service-in-grade requirements for eligibility for consideration by promotion boards in each grade and competitive category.

9. **Promotion Zones.** In the annual promotion plan, SECNAV will establish promotion zones for each grade and competitive category. The limits of each zone will be indicated by the name, active-duty list precedence number and date of rank of the designated junior and senior officer in zone. Below-zone eligibility, if prescribed, will be indicated by the name, active-duty list precedence number and date of rank of the designated junior officer eligible for consideration in each competitive category. Officers in the same grade who are eligible for consideration for promotion to the next higher grade will be considered as officers either above zone, above zone not previously considered, in zone, or below the promotion zone for their competitive category as defined below:

a. **Above Zone.** Officers within a particular grade and competitive category who are eligible for promotion and are senior to the senior officer in the promotion zone.

b. **Above Zone, Not Previously Considered.** Officers in a grade below 0-6 senior to the senor officer in zone for their competitive category, but who have neither been removed from a promotion list to that grade; nor failed of selection to

the next higher grade by an active-duty board, are considered as officers in the promotion zone, and are referred to as above zone, not previously considered.

c. **In Zone.** Officers within a particular grade and competitive category who:

(1) Are senior to the officer designated as the junior officer in the promotion zone, and

(2) Have neither:

(a) Failed of selection (grades below 0-6) or not been recommended for promotion (grades 0-6 and 0-7); nor

(b) Been removed from a promotion list to that grade.

d. **Below Zone.** Officers within a particular grade and competitive category who are eligible for promotion and are junior to the junior officer in the promotion zone.

10. **Limitations on Eligibility.** In the annual promotion plan SECNAV may prescribe the following limitations on eligibility for promotion in a competitive category. The CNO and CMC will make recommendations in proposed promotion plans for exercising the following limitations:

a. Limit the number of officers to be considered by a promotion board from below the promotion zone to those officers determined to be exceptionally well qualified for promotion. When this authority is exercised, SECNAV will prescribe in the annual promotion plan and in each promotion board precept, as applicable, the criteria for determining which officers from below the promotion zone are exceptionally well qualified for purposes of promotion.

b. Limit the officers considered for promotion to the grade of 0-7 to those officers determined to be exceptionally well qualified for promotion. When this authority is exercised, SECNAV will prescribe in the annual promotion plan and in each promotion board precept, as applicable, the criteria for determining which officers in the grade of 0-6 are exceptionally well qualified for promotion.

c. Exclude from consideration for promotion those officers whose established separation date is within 90 days after the convening date of a promotion board for which they would have otherwise been eligible. Modifications to established separation dates made on or after the date the board convenes will not change the eligibility status of such officers for consideration by the board.

11. **Promotion Flow Point and Opportunity.** Promotion zones will be established to meet the separate promotion requirements of each competitive category. This may result in different promotion flow points and opportunity among the competitive categories. Within a competitive category, promotion zones will be designed to provide relatively similar promotion opportunity over a period of five years.

a. Per reference (b), the following guidelines will normally be applied to promotion plans for each competitive category:

Promotion To Grade	Flow Point*	Variance
04	10 years	+ -1 year
05	16 years	+ -1 year
06	22 years	+ -1 year

Promotion To Grade	Oppor-tunity	Variance
04	80 percent	+ -10%
05	70 percent	+ -10%
06	50 percent	+ -10%

* Years of active commissioned service plus all entry grade credit.

b. Per reference (c), promotion flow point for the Medical Corps and Dental Corps will normally be six years service in grade based on date of rank.

c. Promotion flow point and opportunity for any competitive category may be temporarily set outside these guidelines when necessary to attain or to maintain the authorized grade strength. Proposals to deviate from the guidelines prescribed in paragraph 11a must provide supporting rationale and estimated time frame within which compliance with the guidelines will become possible. When deviations from the guidelines in paragraph 11b are needed to attain and maintain the authorized grade strength for the Medical Corps or Dental Corps, the CNO will provide a request for Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN M&RA)) submission to Assistant Secretary of Defense (Health Affairs) (ASD (HA)) and Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P)) including supporting analysis.

12. **Promotion Boards**

a. **Precept.** Promotion boards shall be convened by precept addressed to the president of the board and signed by SECNAV. The precept will include instructions governing the proceedings of the board and will appoint the president and members of the board. The board shall adhere to the instructions in the precept. The president of the board also will serve as a member of the board.

b. **Skill Guidance.** The precept will provide SECNAV guidance relating to the needs of the Navy or Marine Corps for officers with particular skills in each competitive category, and other information and guidelines as necessary to enable the board to perform its functions properly.

c. **Notice of Convening.** SECNAV will issue a notice of the convening of a promotion selection board at least 30 days before the board is convened. The notice will include: (1) the names, active-duty list precedence numbers and dates of rank, of the junior and senor officers in the promotion zone as of the date of notification; (2) the name, active-duty list precedence number and date of rank of the junior officer eligible as of the date of notification, if applicable; and (3) the date the board will convene. The notice will also inform eligible officers of their right to communicate with the selection board and of their responsibility to ensure their personnel records are substantially accurate and complete.

d. **Membership.** The membership of promotion boards shall be determined under section 612 of reference (a) as implemented in reference (g). The following subparagraphs, from paragraphs H1 and H2 of reference (b), govern membership conduct of board proceedings. CNO and CMC shall supply a copy of these two subparagraphs to each selection board member.

(1) **Board President.** The senior member of a selection board may be appointed president of the board and may perform such administrative duties in connection with the board proceedings as the SECNAV may prescribe. A board president has no authority to determine any matter that would constrain the board from recommending for promotion those officers best qualified to meet the needs of the service concerned as specified by SECNAV.

(2) **Participation of Board Members.** Any board member who believes that he or she cannot in good conscience perform his or her duties as a member of the board without prejudice or partiality has a duty to request relief by SECNAV from such duty. Such a request will be honored. Any board member who believes the integrity of the board's proceedings has been adversely affected by improper influence of superior military or civilian authority, misconduct of the board president or a member, or any other reason, has a duty to request relief from his or her obligation of nondisclosure from the Secretary or from the Secretary of Defense, and upon receiving it, to report the basis for his or her belief to that authority.

e. **Board Support.** CNO and CMC shall provide recorders to each selection board to keep the official record of the proceedings, projectionists to perform record presentation for the board and administrative support as required.

f. **Oath.** Each member of the selection board shall swear or affirm that he or she will perform his or her duties as a member of the board without prejudice or partiality, having in view both the special fitness of officers and the efficiency of his or her service. Each recorder and assistant recorder shall swear or affirm that he or she will keep a true record of the proceedings of the board. Each member, recorder, assis-

tant recorder, projectionist and support personnel shall swear or affirm that he or she will not disclose the proceedings or recommendations of the board except as authorized or required by SECNAV or higher authority.

g. **Information to be Furnished to Promotion Boards.** No person may direct that a particular officer be selected by a selection board or that a selection board fail to select a particular individual. Except as provided for in this paragraph, all information and guidance to promotion selection boards shall be provided by SECNAV and shall be in writing and made a part of the board record. The written instructions and guidance to a board will not include information regarding a particular officer, unless unusual circumstances exist that would preclude an officer's performance from being documented in the official record (e.g., sensitive classified mission, etc.). An audio or video recording is an acceptable means of communication with the board, so long as a written transcript is made a part of the board record. The following information shall be furnished to each promotion selection board at the time it is convened:

(1) Marine Corps precepts will specify the maximum number of officers in each grade and competitive category that the board may recommend for promotion.

(2) Navy precepts will specify the percentage of officers the board may recommend from the list of eligible officers. The CHNAVPERS will provide the maximum number of officers that may be recommended after the board convenes and a final number of eligible officers is determined as of the date the board convenes.

(3) The maximum number or percentage of officers in the promotion zone authorized to be promoted within a com-

petitive category may not be increased after the convening of a selection board without written approval of SECDEF.

(4) CHNAVPERS or CMC, acting for SECNAV, shall provide the names of all officers in each competitive category who are to be considered by the board based on the criteria specified in the annual promotion plan as of the date the board convenes.

(5) CHNAVPERS or CMC shall supply all pertinent records of each officer to be considered by the board. Such records shall include all documents, including fitness reports, that are essential for a fair and substantially accurate and complete portrayal of each officer's career as of the date the board convenes. Fitness reports, personal awards or other documents with ending dates after the convening date of the board will not be added to these records even if received while the board is in session. If the board requests information to amplify or clarify official records provided to the board, the board may request such information from SECNAV, via CNO or CMC, as appropriate. Information from outside an officer's official record may not be provided to a board if that information, under Service regulations, could not otherwise be included in the officer's official record without notice to the officer and an opportunity for the officer to comment on it.

(6) Only SECNAV may provide additional guidance to promotion selection boards. The written instructions, information, or guidance furnished to a selection board may not be modified, withdrawn, or supplemented after the board submits its report to SECNAV, under section 617 of reference (a); except as provided in paragraph 14e.

h. **Submission of Precepts.** CHNAVPERS and CMC will submit, not later than 10 days before the proposed con-

vening date, a precept for each selection board to SECNAV, via JAG.

13. **Communication with Promotion Boards.** Officers eligible for consideration by a promotion board may communicate directly in writing with the board. The communication may call attention to any matter concerning the officer that the officer considers important. It may include, as attachments, correspondence from any other individual.

a. Correspondence not originated or endorsed by the eligible officer, including endorsements, or other letters written on behalf of that officer and forwarded under separate cover, is not acceptable and will be returned. Correspondence that contains classified information will not be accepted.

b. Officers who desire to communicate with a promotion board shall forward written communication to the appropriate board via COMNAVMILPERSCOM (NMPC-22) or CMC (MMPR-1) as appropriate, to arrive no later than the convening date of the selection board which is to consider his or her record. Correspondence received after a board is convened will be returned.

c. The selection board shall consider all correspondence which complies with the above requirements.

d. Except as provided by this paragraph, no person may furnish unsolicited information or opinion regarding officers to be considered by a selection board.

14. **Reports of Proceedings of Promotion Boards.** Each promotion board shall submit a report to SECNAV listing the names of the officers recommended for promotion.

a. The report shall be in writing, signed by each board member and the recorder, and shall certify that the board has complied with all instructions contained in the precept. The report shall also certify that the board has carefully considered the record of each officer whose name was furnished to it, and that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are fully qualified and the best qualified for promotion to meet the needs of the Navy or Marine Corps from among the officers whose names were furnished to the board.

b. Each report shall include the name of any officer considered by the board whose record, in the opinion of a majority of the members of the board, indicates that the officer should be required to show cause for his or her retention on active duty under reference (h), because of substandard performance of duty, misconduct, moral or professional dereliction, or because retention is not clearly consistent with the interests of national security.

c. The report shall be forwarded for approval by the SECDEF via first, CHNAVPERS (Navy boards); second CNO or CMC, as appropriate; third, the Judge Advocate General of the Navy (JAG) for legal review; and fourth, SECNAV. In addition, the report of a selection board that considered officers with service in joint duty assignments will be forwarded to the Chairman of the Joint Chiefs of Staff (CJCS) for review under section 618(b) of reference (a).

d. Except as authorized or required by law, the proceedings of a selection board may not be disclosed to any person not a member of the board.

e. If SECNAV determines that the board acted contrary to law, regulation or guidelines, the report will be returned to

the board for further proceedings. The Secretary may modify, withdraw, or supplement instructions, information, or guidelines, as part of a written explanation to the board. Upon receipt of a report that has been returned by SECNAV, the board (or a subsequent board convened under this instruction for the same grade and competitive category) shall conduct proceedings as necessary to revise the report and shall resubmit the revised report to SECNAV, via first, CHNAVPERS (Navy boards); second, CNO or CMC as appropriate; third, JAG for legal review, and fourth, CJCS if necessary.

f. In routing the report of a board that considered officers for promotion to grades 0-4 through 0-8, SECNAV will submit to SECDEF a memorandum for the President forwarding to the Senate nomination lists of the names of the officers approved for promotion. CNO or CMC, as appropriate, shall prepare the memorandum.

g. When the approved report of a selection board identifies officers who should be required to show cause for retention on active duty under subparagraph 14b, and when directed by SECNAV, CHNAVPERS or CMC will initiate a Board of Inquiry required by reference (a) on all such officers.

h. SECNAV may recommend to SECDEF that the board report be approved or disapproved. SECDEF may approve or disapprove the report but may not remove the name of any officer recommended for promotion. Only the President may remove the name of an officer recommended for promotion from the report of a selection board.

15. **Promotion List.** When a selection board report is approved by or on behalf of the President by SECDEF, CHNAVPERS, or CMC as appropriate shall place the names

of all officers approved for promotion within a competitive category on a single list in order of seniority for that competitive category. This list will be known as a promotion list.

16. **Dissemination of Names.** Upon the President's formal nomination to the Senate for confirmation of officers selected for promotion to flag and general rank, the names of those officers shall be officially disseminated. Upon SECDEF's approval of a promotion board report, the names of the officers on the promotion list to 0-6 and below will be disseminated officially within the Department of the Navy. Dissemination will be by ALNAV message. CNO and CMC, as applicable, shall submit the proposed message.

a. CNO or CMC may propose to withhold from the ALNAV the names of officers in the following categories:

(1) Officers against whom sworn court-martial charges have been preferred, but not disposed of; or

(2) Officers with a criminal proceeding in a Federal State or local court pending; or

(3) Officers against whom an investigation is being conducted to determine whether disciplinary/administrative action of any kind should be initiated.

b. The name of any officer, other than those whose promotions the Senate failed to confirm, that was withheld from an ALNAV under subparagraph 16a must be promptly disseminated within the Department of the Navy upon Senate confirmation.

17. **Removal from Promotion List**

a. SECNAV may remove the name of any officer from a promotion list to any grade below 0-7. CHNAVPERS or CMC, as appropriate, may submit requests for such action to SECNAV. In the case of officers on a promotion list for the grades 0-7 and above, CHNAVPERS or CMC, as appropriate, shall provide a request for removal action to the President via SECDEF to SECNAV for signature.

b. If, after consideration of a list of officers approved for promotion by SECDEF, the Senate does not give its advice and consent to the appointment of an officer whose name is on the list, that officer's name shall be removed from the promotion list.

c. If an officer's name is removed from the promotion list by Secretarial action, CNO or CMC, as appropriate, shall notify that officer in writing of his or her removal from the promotion list and the resulting effect on promotion status under paragraphs 18 and 19.

18. **Eligibility of Officers Removed from Promotion List**

a. An officer whose name is removed from a promotion list continues to be eligible for consideration for promotion. If an officer is recommended for promotion by the next selection board convened for that officer's grade and competitive category and the officer is promoted, SECNAV may, upon such promotion, grant the officer the same date of rank, the same effective date for pay and allowances for the grade to which promoted, and the same position on the active-duty list as the officer would have had if the officer's name had not been removed from the first promotion list.

b. Except for limited duty officers, if a Regular officer or a Reserve officer show name was removed from a promotion list to the grade of 0-3 is not recommended for promotion by the next selection board convened for the officer's grade and competitive category, or if the officer's name is again removed from the list of officers recommended for promotion to the grade of 0-3, the officer shall be ineligible for further consideration for promotion.

19. **Failure of Selection for Promotion**

a. Officers in grades below 0-6 who are in or above the promotion zone and are considered but not selected for promotion will be considered to have failed of selection for promotion to the next higher grade.

b. If an officer in a grade below 0-6 whose name was removed from a promotion list is not recommended for promotion by the next promotion board convened for the officer's grade and competitive category, or if the officer's name is again removed from the list of officers recommended for promotion, or if the Senate again does not give its advice and consent to the officer's promotion, the officer shall be considered for all purposes to have twice failed of selection for promotion.

c. Except as provided in subparagraph 19d, officers who fail of selection for promotion remain eligible for consideration by subsequent promotion boards so long as they remain on the active-duty list. Two or more failures of selection subjects an officer to involuntary separation or retirement under references (a) and (h).

d. Regular officers who are subject to discharge under subsection 631(a)(1) of reference (a) as implemented in reference (h) for having twice failed of selection for promotion

to the grade 0-3 and Reserve officers who have twice failed of selection to the grade of 0-3, are not eligible for further consideration for promotion.

e. Officers in or above the promotion zone who are selected for promotion to grade of 0-6 or below but decline the appointment shall be considered to be above zone for subsequent promotion selection boards. Per reference (i), they will not be considered to have failed of selection for promotion for purposes of entitlement to separation pay under section 1174 of reference (a).

20. **Counseling for Officers Who Fail of Selection for Promotion.** CHNAVPERS and CMC shall provide, upon request, counseling for officers who fail of selection for promotion to grades 0-3 to 0-6. Counseling shall consist of reviewing the officer's record and indicating any factors that may account for not having been selected.

a. The counselor will be an officer experienced in officer personnel matters who is senior to and, when practicable, in the same competitive category as the officer requesting counseling. The counselor may not be an officer who served as a member, recorder, projectionist or technical assistant for a promotion board which failed to select the requesting officer for promotion.

b. Requests for counseling should be submitted to COMNAVMILPERSCOM (NMPC-4) or Headquarters, Marine Corps (MMOA), as appropriate.

21. **Promotion of Selectees.** Officers on a promotion list will be appointed as Regular officers or Reserve officers, as appropriate, in the next higher grade as additional officers are needed in each grade and competitive category.

a. Promotions will be made in the order in which the names of officers appear on the promotion list for each competitive category as vacancies become available, except for those officers whose promotion have been delayed. Promotion of officers from one competitive category will be effected regardless of the relative seniority of officers of the same grade in other competitive categories.

b. CMC and CNO shall prescribe monthly numbers, by competitive category and grade, of officers to be promoted and shall announce the names of those officers promoted from the approved promotion list within the monthly numbers authorized.

c. Authority to prescribe monthly numbers and announce promotions may be delegated but not below the level of CHNAVPERS or Deputy Chief of Staff (Manpower and Reserve Affairs) (DC/S (M&RA)).

22. **Effective Dates of Promotion.** Except as provided in paragraph 23 or as otherwise provided by law, the date of rank of an officer promoted to a higher grade under section 624 of reference (a) and this instruction is the date of appointment. Appointments will be considered accepted and effective on the date specified in the promotion ALNAV or ALMAR unless the officer concerned expressly declines the appointment within 60 days of the effective date.

23. **Delay of Promotion**

a. **Criteria for Promotion Delay.** CHNAVPERS or CMC, as appropriate, or a member's commanding officer, may delay the appointment of an officer selected for promotion. If the appointment is delayed, the delaying officer shall, as soon as practicable, forward the information re-

quired by paragraph 23b to SECNAV for ratification. Promotion may be delayed under this instruction if:

(1) Sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of.

(2) An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer.

(3) Processing for separation for cause has been initiated under reference (h).

(4) A criminal proceeding in a Federal or state court is pending against the officer.

(5) There is cause to believe that the officer is mentally, physically, morally, or professionally unqualified.

b. **Command Requests for Delay**

(1) Commanding officers who consider delay of an officer's promotion warranted and delay an officer's promotion, shall submit justification for the delay t SECNAV via, CHNAVPERS (NMPC-82) (copy to COMNAVMILPERSCOM (NMPC-22)), or CMC (MMPR-1) as appropriate, within 10 days of knowledge of the circumstances warranting the delay, or as soon thereafter as practicable.

(2) Each justification for delay to SECNAV must include the following documents:

(a) A copy of the notification to the officer and;

(b) A statement by the officer. If the officer declines to make a statement, the officer concerned shall submit a signed statement to that effect;

(c) Supporting rationale for delay from the officer's commanding officer based on his or her knowledge of the officer involved; and

(d) A recommendation by CH-NAVPERS or DC/S (M&RA), as appropriate.

c. **Notification of Grounds for Delay.** The promotion of an officer may be delayed only if the officer has been given written notice of the grounds for the delay before the effective date of the appointment, unless it is impractical to do so, in which case such written notice shall be given as soon as practicable.

d. **Limitations on Delay.** The promotion of an officer may not be delayed under this paragraph for more than six months after the date on which the officer would otherwise have been promoted, unless SECNAV specifies a further period of delay. The CHNAVPERS or CMC will submit timely requests, with supporting rationale for any extension of delay of promotion. An officer's promotion may not be delayed more than 90 days after final action has been taken in any criminal case against the officer in a Federal or state court, more than 90 days after final action has been taken in any court-martial against the officer, or more than 18 months after the date on which the officer would otherwise have been promoted, whichever is later.

e. **Removal from the Promotion List.** If during a delay of promotion, it is determined that removal from the promotion list is appropriate, removal action under paragraph 17a

may be initiated. Although removal action is contemplated, requests for delay extensions as provided in paragraph 23d shall be submitted to SECNAV as necessary until the officer's name is removed from the promotion list.

f. **Subsequent Promotion.**

(1) If a promotion has been delayed under paragraph 23a(l)-23a(4) and no action has been taken to delay an appointment under paragraph 23a(5); and

(a) no disciplinary action is taken against the officer, charges against the officer are withdrawn or dismissed.

(b) the officer is not ordered administratively separated under reference (h); or

(c) the officer is acquitted of the charges brought against him or her, the officer shall be retained on the promotion list and shall. upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted and the same position on the active-duty list as he or she would have had if no delay had occurred, except as provided below.

(2) If SECNAV determines that the officer was unqualified for promotion for any part of the delay, the date of rank, effective date of pay and allowances, and position on the active-duty list may be adjusted. Officers whose promotions were delayed under paragraph 23a(5) whom SECNAV later determines are qualified, shall be promoted in the same manner.

24. **Selective Early Retirement.** Regular officers on the active-duty lists in pay grades 0-5 through 0-8 may be selected for involuntary retirement prior to mandatory retire-

ment dates determined under Section 633. 634, 635, or 636 of reference (a). SECNAV may convene a selective early retirement selection board, based on the recommendations and supporting rationale of CNO or CMC.

a. **Uses of Selective Early Retirement.** Early retirement will be used primarily during periods of officer strength reduction as a means to reduce he numbers of senior officers commensurate with reductions in other grades or to manage an officer grade imbalance or strength overage within a competitive category. It may not be used for the sole purpose of enhancing promotion opportunity; nor may it be used as a substitute for the disposition of commissioned officers who would otherwise be processed for administrative separation under reference (h).

b. **Eligibility for Selective Early Retirement**

(1) A Regular officer on the active-duty list in the Navy and Marine Corps may be considered for early retirement as follows:

(a) **Grade 0-5.** Officers who failed of selection for promotion to 0-6 two or more times whose names are not on a selection board report.

(b) **Grade 0-6.** Officers with four or more years of active service in grade whose names are not on a selection board report.

(c) **Grade 0-7.** Officers with three and one-half or more years of active service in grade whose names are not on a selection board report.

(d) **Grade 0-8.** Officers with three and one-half or more years of active service in grade.

(2) Not more than a fixed number or percentage, as prescribed by SECNAV, of the officers in each grade and competitive category who considered for selective early retirement may be selected by the board. The number or percentage prescribed by SECNAV for each grade and competitive category may not exceed 30 percent of the total number of officers considered in the particular grade and competitive category.

(3) The list of officers provided to a board for consideration for selective early retirement shall include each officer on the active-duty list in the same grade and competitive category whose position on the active-duty list is between that of the most junior officer in that grade and competitive category whose name is provided and that of the most senior officer in that grade and competitive category whose name is provided to the board who meet the criteria of subparagraph 24b(l). Except, officers serving in permanent grades 0-5 and 0-6 may not be considered for selective early retirement more than once in any 5-year period while in the same grade.

c. **Retirement Boards.** A separate board will be convened by precept signed by SECNAV for each grade and competitive category designated for selective early retirement. Boards shall be composed and sworn in the same manner as promotion selection boards under paragraph 12. Promotion selection boards may be reconvened as selective early retirement boards.

d. **Information to be Furnished to the Board**

(1) SECNAV will furnish the following information to each board at the time it is convened:

(a) A list of names of officers to be considered for early retirement.

(b) Information on the skill needs and qualifications for the grade and competitive category.

(2) CHNAVPERS and the CMC shall provide the pertinent records of officers to be considered for early retirement.

e. **Reports.** Each board shall submit a written report to SECNAV listing the names of the officers recommended for retirement.

(1) The report of each selective early retirement board shall certify that the board has carefully considered the record of each officer whose name was furnished and that, based upon the identified needs of the service for officers serving in the grade and competitive category concerned, it is the opinion of a majority of the members that the early retirement of the officers whose names are listed in the selection board report is in the best interest of the Navy or Marine Corps, as appropriate.

(2) The report shall be forwarded for approval by SECNAV via first, CHNAVPERS (Navy boards); second, CNO or CMC; and third, JAG for legal review.

f. **Retirement**

(1) A Regular officer of the Navy or Marine Corps in the permanent grade 0-5 or 0-6 who is recommended for selective early retirement and whose early retirement is approved by SECNAV shall, on the date requested by the officer and approved by SECNAV. be retired under any provision of law under which the officer is eligible to retire. The

retirement date of such officer shall not be later than the first day of the seventh calendar month beginning after the month in which SECNAV approved the report of the selective early retirement board.

(2) A Regular officer of the Navy or Marine Corps in the permanent grade of 0-7 or 0-8 who is recommended for early retirement and whose early retirement is approved by SECNAV shall, on the date requested by the officer and approved by SECNAV be retired under any provision of law under which the officer is eligible to retire. The retirement date of such officer shall not be later than the first day of the tenth calendar month beginning after the month in which SECNAV approved the report of the selective early retirement board.

(3) If the officer is nor eligible for retirement under any provision of law, the officer shall be retained on active duty until he or she is qualified for retirement under section 6323 of reference (a), and then be retired under that section, unless sooner discharged or retired under another provision of law.

(4) The early retirement of an officer under the provisions of this instruction is considered an involuntary retirement for purposes of any other provision of law.

25. **Establishing Authorized Strength for Promotion Planning and Execution**

a. CNO and CMC will submit to SECNAV annually a five-year officer promotion plan for each grade and competitive category as outlined in paragraph 5.

b. Proposed promotion plans are to be for the current and projected authorized strength requirements established under

paragraph 25a. Promotion plans will be submitted not later than 45 days prior to the proposed convening date of the first applicable selection board.

c. The CNO and CMC shall submit any significant changes to the promotion plan in any grade or competitive category required by events occurring after the plan has been approved.

d. At the completion of a fiscal year's promotion cycle, CHNAVPERS and CMC will provide for submission to the Assistant Secretary of Defense (FM&P). the Defense Officer Promotion Report (DOPR)(Report Control Symbol DD-FM&P(A) (1621)) as prescribed in reference (b).

26. **Responsibility**

a. The Assistant Secretary of the Navy (Manpower and Reserve Affairs) is responsible for management oversight of the Promotion and Selective Early Retirement systems.

b. The CNO and CMC are responsible for promotion and selective early retirement planning and execution to meet the policy objectives of this instruction.

27. Reports. Board reports are exempt from reports control by SECNAVINST 5214.2B.

H. LAWRENCE GARRETT, III
Secretary of the Navy

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In the Supreme Court of the United States

EVELYN L. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are promoted, including a requirement that military appointments be made by the President, but it does not specify what happens when those procedures are not followed. The question presented is:

Whether the failure to follow DOPMA's procedures results in automatic appointment, by operation of law, of the affected officer to the next higher rank.

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In the Supreme Court of the United States

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EVELYN L. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 458 F.3d 1372. The opinion of the United States Court of Federal Claims (Pet. App. 16a-29a) is reported at 67 Fed. Cl. 158.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. A petition for rehearing was denied on October 26, 2006 (Pet. App. 55a). On January 12, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 25, 2007, and the petition was filed on March 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are promoted.[1] The promotion process is initiated by the Secretary of a military department, who, in response to departmental needs, "convene[s] selection boards to recommend for promotion [certain military officers] to the next higher permanent grade." 10 U.S.C. 611(a) (Supp. IV 2004). After completing its prescribed tasks, each selection board "submit[s] to the Secretary of the military department concerned a written report * * * containing a list of the names of the officers it recommends for promotion." 10 U.S.C. 617(a). The Secretary of the military department concerned then reviews the report and ultimately submits it, "with his recommendations thereon, to the Secretary of Defense for transmittal to the President for his approval or disapproval." 10 U.S.C. 618(a)-(c). The President has the authority to remove the name of a recommended officer from a selection board's report. 10 U.S.C. 618(d).

After the President has approved the selection board's report and thereby nominated the named officers for a promotion, "the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of seniority of such officers on the active-duty list." 10 U.S.C. 624(a)(1).

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[1] Congress amended certain provisions of DOPMA in 2006. See John Warner National Defense Authorization Act for Fiscal Year 2007 (Warner Act), Pub. L. No. 109-364, §§ 511-515, 120 Stat. 2181-2187. Unless otherwise noted, references to DOPMA are to that Act as it existed on February 1, 2002.

That list is used to determine the named officers' promotion dates, which are ultimately set by the Secretary concerned under Sections 624(b)(2) and 741(d). 10 U.S.C. 624(b); 10 U.S.C. 741(d) (2000 & Supp. IV 2004). The statute provides: "Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed," in the order in which the officers' names appear on the list. 10 U.S.C. 624(a)(2).

Subsection (d) of Section 624 authorizes the Secretary of the military department concerned to issue regulations delaying the date of an officer's promotion beyond the date on which the officer would otherwise have been promoted (*i.e.*, beyond the date on which the officer would have been selected for promotion from the promotion list). See 10 U.S.C. 624(d) (2000 & Supp. I 2001).[2] Most relevant here, Section 624(d)(2) authorizes the Secretary concerned to delay the promotion of an officer when "there is cause to believe that the officer is * * * professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. 624(d)(2) (Supp. IV 2004). In cases of delay, the officer whose promotion is being delayed must be given timely, written notice of the grounds for the delay, 10 U.S.C. 624(d)(3), and a promotion "may not be delayed * * * more than 18 months after the date on which such officer would otherwise have been appointed," 10 U.S.C. 624(d)(4). The statute does not specify a consequence for delay beyond eighteen months.

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[2] See SECNAV Instruction 1420.1A para. 23 (Jan. 8, 1991) (Pet. App. 92a-95a). Instruction 1420.1A was cancelled when the Secretary of the Navy issued SECNAV Instruction 1420.1B (Mar. 28, 2006) (which contains similar pertinent provisions). See *id.* para. 23.

After the President has nominated the named officers (by approving the selection board's report), he forwards the nominations to the Senate, as required by Section 624(c), which mandates that appointments under DOPMA "shall be made by the President, by and with the advice and consent of the Senate." 10 U.S.C. 624(c) (Supp. IV 2004). The name of any officer not confirmed by the Senate is removed from the list. 10 U.S.C. 629(b).

Once an officer has been nominated by the President and confirmed by the Senate, the officer must still be appointed by the President. See 10 U.S.C. 624(c) (Supp. IV 2004); see also 10 U.S.C. 629(a). Appointment generally occurs through the issuance of a letter signed by or for the President to each appointee, along with a certificate of appointment. See *Dysart* v. *United States*, 369 F.3d 1303, 1308 (Fed. Cir. 2004). Under Section 626(a), an "officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. 626(a). The relevant Secretary determines the date of the appointment, pursuant to Sections 624(b)(2) and 741(d). See 10 U.S.C. 624(b)(2); 10 U.S.C. 741(d) (2000 & Supp. IV 2004).

2. Petitioner entered active duty in the United States Navy as a physician in 1983. Pet. App. 16a. Since 1991, petitioner's state-issued medical license restricted her practice of medicine to federal facilities. *Id.* at 2a, 16a. On April 21, 1999, the President nominated petitioner for promotion to the rank of captain. *Id.* at 2a. Petitioner's projected promotion date was August 1, 2000. *Id.* at 17a. The Senate confirmed petitioner's nomination on June 30, 1999. *Id.* at 2a.

On October 17, 1998, Congress amended 10 U.S.C. 1094. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Thurmond Act), Pub. L. No. 105-261, § 734(a), 112 Stat. 2072. Before October 1, 1999, the effective date of the amendment (Thurmond Act § 734(c)(1), 112 Stat. 2073), Section 1094 required all Department of Defense (DoD) healthcare professionals to have a "current license." Pet. App. 2a (quoting 10 U.S.C. 1094(a)(1) (1994)). The amendment added the requirement that the license also be unrestricted. *Ibid.*

In December 1999, the Navy Bureau of Medicine and Surgery directed petitioner to demonstrate why the Navy should retain her services, given her lack of an unrestricted medical license. Pet. App. 2a. A Navy Board of Inquiry determined that petitioner should be retained. *Id.* at 2a-3a. The Chief of Naval Personnel determined, however, that petitioner might no longer be eligible for promotion to captain because her medical license was restricted. *Id.* at 3a. On June 27, 2000, the Navy notified petitioner that her promotion would be delayed pending resolution of the issue by the Secretary of the Navy. *Ibid.*

3. On September 26, 2000, petitioner filed this action in the United States District Court for the District of Columbia. Pet. App. 3a. Petitioner claimed that the delay in her promotion was arbitrary and capricious. *Ibid.* The district court dismissed petitioner's complaint, and she appealed. *Ibid.*

On February 1, 2002, while petitioner's appeal was pending before the District of Columbia Circuit, the eighteen-month delay period set forth in Section 624(d)(4) expired. Pet. App. 3a-4a. Recognizing that this expiration had occurred without her name being removed from the promotion list, on March 5, 2002, petitioner ap-

plied to the Board of Correction for Naval Records (BCNR), seeking a determination that she had been automatically promoted to captain by operation of law as of February 1, 2002. *Id.* at 4a. Subsequently, on May 10, 2002, the Secretary of the Navy removed petitioner's name from the promotion list. *Ibid.* And on February 10, 2003, the BCNR denied petitioner's application for relief. *Ibid.* Thereafter, the Secretary of the Navy granted petitioner's request for retirement effective January 1, 2004. *Ibid.*

Meanwhile, on April 30, 2003, the D.C. Circuit remanded petitioner's appeal to the district court and advised her to seek leave of the district court to amend her complaint to add a monetary claim and to transfer her case to the United States Court of Federal Claims. Pet. App. 4a. Petitioner did so, and the district court granted her motion. *Ibid.*

4. a. In the Court of Federal Claims, petitioner alleged that she had been promoted to captain by operation of law under Section 624(d). Pet. App. 4a. Petitioner also argued that Section 1094's unrestricted medical-license requirement did not apply to her because she was in an administrative position and did not provide direct patient care. *Id.* at 4a-5a, 11a-14a. Petitioner requested pay and allowances for the rank of captain beginning on August 1, 2000, her projected promotion date. *Id.* at 5a, 17a.

Relying on *Dysart*, *supra*, the Court of Federal Claims held that the President has complete discretion concerning the appointment of military officers and that the expiration of the eighteen-month period therefore did not result in the automatic appointment of petitioner in the absence of Presidential action. Pet. App. 28a. Ac-

cordingly, the court granted the government's motion for judgment on the administrative record. *Id.* at 29a.

b. A unanimous panel of the Federal Circuit affirmed. Pet. App. 1a-15a. It held that, under its decision in *Dysart*, petitioner was not, and could not have been, automatically promoted because "the language of [Section 624] does not provide for automatic appointment." *Id.* at 10a (quoting *Dysart*, 369 F.3d at 1313). In addition, the court reasoned that, even if the language did so provide, "the statute could not constitutionally provide for automatic appointment because 'military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute.'" *Ibid.* (quoting *Dysart*, 369 F.3d at 1315). The court held also that the Navy's denial of petitioner's promotion was not contrary to Section 1094's requirement that DoD healthcare professionals hold unrestricted medical licenses. *Id.* at 11a-14a. Accordingly, the court of appeals upheld the Navy's determination that petitioner was not qualified for promotion. *Id.* at 14a.

ARGUMENT

Petitioner does not challenge the court of appeals' holding that she was not qualified for promotion because she lacked the requisite medical license. See Pet. 12 n.9; Pet. App. 11a-14a. Instead, petitioner argues only that, despite her lack of professional qualifications for the promotion, she was automatically promoted by operation of law because her name was not removed from the promotion list within the eighteen-month time frame set forth in Section 624(d)(4). See Pet. 19-28. The Federal Circuit's unanimous decision rejecting that argument is correct, and this case has limited prospective importance.

Moreover, as petitioner acknowledges (Pet. 17), there is no conflict with any other court of appeals because claims like petitioner's "are litigated almost exclusively in the Federal Circuit," and thus "only" the Federal Circuit has addressed this issue. Further review is therefore unwarranted.

1. Petitioner contends that DOPMA's plain language provides for automatic appointment when an officer's name is retained on the promotion list beyond the eighteen-month time frame set forth in Section 624(d)(4), regardless of whether the President has actually appointed the officer to the new position and regardless of whether the officer is even qualified for the new position. See Pet. 19-22. She further contends that the Federal Circuit incorrectly concluded that her interpretation of DOPMA would render the statute unconstitutional. See Pet. 23-28. Petitioner is wrong on both counts.

a. First, regarding the statutory language, petitioner relies principally upon Section 624(a)(2), which states: "Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next grade when additional officers in that grade and competitive category are needed." 10 U.S.C. 624(a)(2). Petitioner contends that this provision mandates that an officer whose name is on a promotion list approved by the President and confirmed by the Senate must be—and, therefore, automatically is—promoted if the officer's name is not removed from the promotion list within the eighteen-month time frame set forth in Section 624(d)(4), even if, as in petitioner's case, the officer is professionally unqualified for the promotion.

Petitioner's interpretation is incorrect, because it reads Section 624(c) out of the statute. Section 624(c) requires that "[a]ppointments under this section shall be

made by the President." 10 U.S.C. 624(c) (Supp. IV 2004). This language unambiguously and without exception requires Presidential appointment of all officers promoted under the statute—an appointment that is separate and distinct from Section 624(a)'s requirement that the President approve the selection board's report before preparation of the promotion list. Cf. *Weiss* v. *United States*, 510 U.S. 163, 170 n.4 (1994) ("10 U.S.C. § 624 requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade—*e.g.*, if a captain is promoted to major, he must receive another appointment.").

As the *Dysart* court explained, "the language of the statute does not provide for automatic appointment without action by the President. Rather, the statute provides that appointments are made 'by the President, by and with the advice and consent of the Senate.'" 369 F.3d at 1313 (quoting 10 U.S.C. 624(c)). DOPMA, in short, does not permit appointments without Presidential action. Petitioner's claim to the contrary flatly contradicts the plain language of the statute.

This understanding of DOPMA is confirmed by the fact that Section 624(d)(4) does not specify that automatic appointment is the consequence of a delay beyond the eighteen-month time frame. Indeed, if Congress had provided for automatic appointment in Section 624(d)(4), that would have directly contradicted the Presidential appointment requirement in Section 624(c). As this Court has explained on numerous occasions, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 159 (2003)

(quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). Cf. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the [statutory] deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."). Because Congress did not provide for automatic appointment in DOPMA, the court of appeals was correct not to do so.

Moreover, as discussed below, such an automatic-appointment provision would, at a minimum, create significant constitutional concerns. Congress's silence regarding the consequence of a delay beyond eighteen months therefore should not be read as implicitly providing for automatic appointment. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Accordingly, petitioner's claim that the Federal Circuit erred in interpreting DOPMA is without merit.

b. Petitioner's contention (Pet. 23-28) that her interpretation of DOPMA would not raise significant constitutional problems is equally without merit. As the *Dysart* court correctly explained, the "constitutional process allows the President complete discretion in choosing whether or not to appoint an officer." 369 F.3d at 1311. Chief Justice Marshall said as much in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), in which he explained that the appointment is "the sole act of the President." *Id.* at 157. Thus, even if it intended to provide for automatic appointments in DOPMA, "Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic ap-

pointments." *Dysart*, 369 F.3d at 1314.[3] The Federal Circuit appropriately recognized this obvious constitutional problem arising from petitioner's interpretation of DOPMA and declined to adopt that interpretation.[4]

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[3] Petitioner's alternative argument (Pet. 26-27) that Congress can provide for automatic appointment through the use of its constitutional authority over the appointment of inferior officers is similarly without merit. To the extent the Constitution permits Congress to alter the process for the appointment of inferior officers, the Constitution gives Congress only the power to "vest the Appointment of such inferior Officers * * * in the President alone, in the Courts of Law, or in the heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The Constitution does not give Congress the power to provide for automatic appointment. Under petitioner's reading, however, that is precisely what Congress has done in DOPMA.

[4] Indeed, not only would petitioner's reading of the statute permit promotion without Presidential appointment, it also would permit promotion without Senate confirmation, even in cases in which DOPMA and the Constitution require such confirmation. Under petitioner's reading of 10 U.S.C. 624 (2000 & Supp. I 2001), automatic promotion occurs immediately upon the expiration of the eighteen-month period specified in Section 624(d)(4)—a period that begins on the officer's projected promotion date. See Pet. 5. Although petitioner suggests (*ibid.*) that the projected promotion date is not set until after Senate confirmation, nothing in DOPMA requires the projected promotion date to be set after Senate confirmation. In fact, the statute contemplates that the projected promotion date will be set immediately upon the President's approval of the selection board's report, regardless of whether Senate confirmation has occurred. See 10 U.S.C. 624(a)(1) ("When the report of a selection board convened under * * * this title is *approved by the President*, the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of the seniority of such officers on the active-duty list.") (emphasis added). The 2006 amendments to Section 629(c) make this clear. See Warner Act § 515(a)(2)(B), 120 Stat. 2185 (to be codified at 10 U.S.C. 629(c)(1) and (3) (2006)) (recognizing that promotion lists, which include projected promotion dates, are prepared regardless of whether Senate

In any event, there is no warrant for review by this Court of a constitutional question that is easily—and properly—avoided by the court of appeals' correct interpretation of DOPMA. Cf. *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) ("Under our precedents, '[b]efore inquiring into the applicability of [a provision of the Constitution], we must "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."'") (citation omitted).

2. Review is also unwarranted because the decision below not only does not conflict with any decision of this Court or of another court of appeals, but also because it has limited continuing importance.

a. Although thousands of military promotions are made annually under DOPMA, see Pet. 14, petitioner's claim that the question presented is a recurring one is incorrect. Indeed, excluding this case, petitioner cites only three other reported cases in which this question has arisen under DOPMA. See Pet. 14-15.[5] Four reported cases in the roughly twenty-six years since DOPMA took effect in 1981—with no reported cases within the first seventeen years of DOPMA's enactment—hardly make this question a recurring one. To the contrary, the question has arisen infrequently be-

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confirmation has yet occurred); see pp. 13-14, *infra* (discussing 2006 amendment). Thus, it logically follows from petitioner's reading of DOPMA that an officer could be promoted without having been either confirmed by the Senate or appointed by the President. Such a result cannot be reconciled with DOPMA's, not to mention the Constitution's, requirement of Senate confirmation and Presidential appointment.

[5] A petition for a writ of certiorari is pending before this Court in one of those three cases. See *Barnes* v. *United States*, No. 06-1466 (filed May 4, 2007).

cause, as history demonstrates, virtually all promotion decisions under DOPMA occur before the conclusion of the eighteen-month time frame set forth in Section 624(d)(4). Thus, the statute has helped ensure that military promotion decisions are made timely and efficiently, without significant involvement by the courts. This Court's review of a question that has arisen—and is likely to arise—only sparingly is not warranted.

b. Recent amendments to DOPMA also make this case a poor vehicle to resolve the meaning of DOPMA's delay provisions. In 2006, Congress amended DOPMA and, in doing so, partially addressed the issue of delay under Section 624(d). Congress inserted, among other provisions, the following subsection into Section 629(c):

> (1) If an officer whose name is on a list of officers approved for promotion under section 624(a) * * * is not appointed * * * under such section during the officer's promotion eligibility period, the officer's name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment.

Warner Act § 515(a)(2)(B), 120 Stat. 2185-2186 (to be codified at 10 U.S.C. 629(c)(1) (2006)).[6] Section 629(c)(3), also a new subsection, defines "promotion eligibility period" as the period beginning on the date on which the President approved the promotion list under Section 624(a) and ending on the "first day of the eighteenth month following the month on which the list is so approved." Warner Act § 515(a)(2)(B), 120 Stat. 2186 (to be codified at 10 U.S.C. 629(c)(3) (2006)). No similar provi-

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[6] The Warner Act redesignated the former Section 629(c) as Section 629(d). § 515(a)(2)(A), 120 Stat. 2185.

sions were contained in DOPMA before the 2006 amendments.

By specifying a consequence when there is a delay beyond (approximately) eighteen months from Presidential approval and when no Senate confirmation has yet occurred, these new provisions shed further light on whether 10 U.S.C. 624 (2000 & Supp. I 2001) requires automatic appointment of the affected officer after eighteen months of delay. These amendments support the government's interpretation of DOPMA because, though Congress could easily have done so (in light of the Federal Circuit's prior decision in *Dysart*), it did not specify that automatic appointment is the result of a delay beyond eighteen months when Senate confirmation has already occurred. These amendments also undermine petitioner's suggestion (Pet. 5) that the projected promotion date is not set until after Senate confirmation. Accordingly, even if the Court were inclined to conclude that its review of the meaning of DOPMA's delay provisions were warranted, the Court should await a case that involves, and takes into consideration, the significance of these relevant amendments.

3. Finally, even apart from its limited practical importance, this case would be an inappropriate vehicle to address the question presented. As discussed, petitioner does not challenge the court of appeals' ruling that she was not qualified for a promotion because she lacked the requisite medical license. See Pet. 12 n.9; Pet. App. 3a, 11a-14a. Whatever else is true, there is no reason to reach out and decide the constitutional question framed by petitioner when the plaintiff is manifestly unqualified for the position at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-1289

IN THE

Supreme Court of the United States

EVELYN L. LEWIS, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government insists that the Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, requires the President, following Senate confirmation, to issue letters of appointment in order to effectuate the appointment of promoted military officers. But nothing in DOPMA requires or even contemplates such presidential action. The single provision the Government invokes does not remotely support its position. And even if it did, other provisions the Government ignores conclusively disprove the Government's contention. Section 624(a)(2) could not be clearer: Officers who have been nominated by the President and confirmed by the Senate for promotion "shall be" appointed *unless* their names are removed from the promotion list by the end of a prescribed statutory period. There is no plausible textual basis, therefore, for avoiding consideration of whether DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

That pure question of law warrants review. The Government agrees that the Federal Circuit is the only court that will face the issue and that it has conclusively resolved the question. When considered with *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), the decision below therefore effectively creates a nationwide rule. Absent review, it will subject countless military officers to unwarranted denials or delays of promotion. This result is precisely what Congress sought to avoid in enacting DOPMA, which was designed to bring certainty and efficiency to a process that affects thousands of military officers every year. Far from being a basis for denying certiorari, the fact that no other circuit will interpret DOPMA's delay provisions or consider the important statutory and constitutional issues raised here demonstrates the necessity of this Court's review.

A. The Question Presented Is Important and Recurring.

The Federal Circuit has correctly acknowledged that the interpretation of DOPMA's delay provisions raises "*significant questions* concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306 (emphasis added). Nevertheless, the Government contends that, for three reasons, the Court should deny review: First, that there is no conflict among the circuits; Second, that the question is a not recurring one; and Third, that recent amendments to the statute limit the future significance of the Federal Circuit's decision. These arguments are without merit.

1. The Government agrees that the Federal Circuit has addressed the issue, Opp. at 8, and that no other court of appeals will have the opportunity to interpret DOPMA's delay provisions because claims like Dr. Lewis's are litigated exclusively in the Federal Circuit. *Id.* In the Government's view, the absence of a split in the circuits warrants denying the petition. Not so. Although the absence of a split ordinarily counsels against review, here the opposite is true. It is precisely because the only court faced with the Question Presented has conclusively—and wrongly—decided it that the Court should grant the petition.[1] The Federal Circuit's flawed interpretation creates a *de facto* nationwide rule regarding DOPMA's meaning. Absent review and correction here, the decision below will continue to subject the officer corps of all of the military services—including the thousands of officers who are promoted each year—to uncertainty that

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[1] This Court routinely grants review in patent cases from the Federal Circuit, where "conflict among and with other federal courts . . . has been virtually eliminated," based "largely on the importance of the questions presented." Robert L. Stern et al., *Supreme Court Practice* 263 (8th ed. 2002). The same is true in this case.

Congress not only never intended but in fact affirmatively sought to prevent.

2. Although it acknowledges that "thousands of military promotions are made annually under DOPMA," Opp. at 12, the Government claims that the Question Presented is not recurring because only a few reported cases—another of which, *Barnes v. United States*, No. 06-1446, is currently pending before this Court—have addressed DOPMA's delay provision, 10 U.S.C. § 624(d). But reported cases are not even close to the best indicator of the frequency with which the Question Presented arises. The vast majority of military personnel issues are adjudicated by record correction boards created by 10 U.S.C. § 1552, and never reach the courts because the affected service-member lacks the financial resources needed for litigation. As a practical matter, it is impossible for anyone outside the Government to know precisely how many § 624(d) cases have come before—or are currently pending in—the correction boards. But the bipartisan congressional correspondence reproduced as an appendix to this Reply shows that violations of § 624(d) are by no means a rarity. Reply App. 1ra-3ra. Considering the sheer number of officers who undergo the promotion process each year, that correspondence suggests that the reported cases to which the Government has restricted itself in seeking to minimize the scope of the problem are only the tip of the iceberg.

3. The 2006 DOPMA amendments do not relate to the Question Presented. They clarify the *Legislative* dimension of the appointment process and do not speak to the role of the Executive in that process or to the delay provisions at issue in this case. They thus shed no light on how the provisions pertinent here should be interpreted,[2] except to the ex-

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[2] The Government concedes that the 2006 amendments are inapplicable to Dr. Lewis. Opp. at 13-14. They do not change the provisions

tent that their legislative history confirms that uncertainty in the promotion process is unacceptable. *See* S. Rep. 109-254 (2006), at 316 ("Relegation of any officer to a . . . 'limbo' status serves the interest of neither the individual officer nor the officer corps."). The Federal Circuit's interpretation of DOPMA allows the President to act upon a military officer's appointment at any time, with the potential result that officers who have been nominated and confirmed will nevertheless languish interminably on the promotion list, awaiting some further Executive act nowhere specified in the statute to effectuate their appointments. This "limbo" has quite

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that govern this case, and to the extent they can shed light on congressional intent in earlier-enacted legislation, they demonstrate that DOPMA was intended to provide for appointments when its requirements are met. The main amendment on which the Government relies provides that if an officer "is not appointed to [the next] grade under such section during the officer's promotion eligibility period, the officer's name shall be removed from the list *unless as of the end of such period the Senate has given its advice and consent to the appointment.*" John Warner National Defense Authorization Act for Fiscal Year 2007 § 515(a), Pub. L. No. 109-364, 120 Stat. 2185 (to be codified at 10 U.S.C. § 629(c)(1) and (3)) (2006) (emphasis added). By its terms, that amendment is irrelevant to the Question Presented here, i.e., what occurs under DOPMA when a *confirmed* officer like Dr. Lewis is retained on the promotion list past the maximum statutory delay period.

Moreover, the Conference Report states that the amendment was intended as a "clarification." H.R. Rep. No. 109-702 (2006), at 105. The report and amendment make sense only if one understands that it was already clear that the Executive could delay an officer's appointment and remove the officer from the promotion list in defined circumstances and within a defined period. Although the prior version of the statute required Senate confirmation, it was not clear what would happen if the officer was never confirmed. The amendment answers that question by specifying a time frame for Legislative action; it does not change the fact that, under DOPMA, a nominated, confirmed officer is promoted on his or her projected promotion date—absent a delay that complies with § 624(d). Far from altering the operation of § 624(d), the amendment harmonizes the arrangements for delays of confirmation and delays of appointment.

wisely been condemned by Congress and provides a substantial reason for granting the petition.

In addition to resting its argument on these unsound bases, the Government glosses over the Federal Circuit's essential constitutional holding concerning *Marbury* and the Appointments Clause. Like the Court of Appeals, the Government does not grapple with whether Congress may vary in any way the manner in which the steps in the appointments process are accomplished.[3] The Court should grant review.

B. The Government's Interpretation of DOPMA Wrongly Subjects Thousands of Military Officers to Unwarranted Promotion Denials and Delays.

The Government's reading of DOPMA suffers from the same flaws as the Federal Circuit's interpretation. DOPMA plainly provides for nomination of an officer by the President, 10 U.S.C. §§ 618(c)(1), 629(b), consideration of nominations by the Senate, *id.* § 629(b), and, following confirmation by the Senate, action by the service secretary either to project a promotion date for the officer, *id.* §§ 624(b),

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[3] Instead, the Government falls back on the avoidance canon, suggesting that review is unwarranted because the lower court's interpretation of DOPMA avoids any constitutional issues. Opp. at 12. That canon, however, is not applicable where, as here, the Court would have to ignore clear statutory language and congressional intent, adopt an implausible reading of a statute, or write language out of a statute. *See, e.g.*, *HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (error to apply canon where meaning of statute is clear); *Miller v. French*, 530 U.S. 327, 337 (2000) (rejecting construction that would avoid difficult separation of powers questions when that construction was implausible and would have subverted plain meaning of statute); *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (rejecting argument that deadline should be read out of statute to avoid due process issue because "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted") (internal quotation marks omitted). The Government asks the Court to do all three.

741(d), or to delay the officer's "appointment under this section," the latter of which may result in removal of the officer's name from the list. *Id.* § 624(d). If an officer's name is not removed from the list within eighteen months, however, the officer is promoted. *Id.* § 741(d)(2); *see also id.* § 624(b)(2).

Despite this clear statutory scheme—which sets forth the role of both the Executive and Legislative branches in the appointments process and delineates clear mechanisms and timeframes for Executive action—the Government argues that the President has unlimited discretion to delay military appointments. *E.g.*, Opp. at 9. It relies almost exclusively on § 624(c), which provides that:

> Appointments made under this section shall be made by the President, by and with the advice and consent of the Senate, *except that* appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(Emphasis added.)

According to the Government, § 624(c) requires some presidential action beyond § 624(a)'s requirement that the President approve the list of officers recommended for nomination by the selection board. Opp. at 9. But § 624(c) requires nothing of the kind. On the contrary, because most military officers are "inferior officers" within the meaning of the Appointments Clause, *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring), for whom Congress has the power to vary the appointments process, § 624(c) simply clarifies that certain lower-grade officers are exempt from the advice and consent requirement. *See* U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by law vest the Ap-

pointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). This exemption from Senate confirmation does not remotely support the Government's view about what kind of presidential action is required to effectuate an appointment, but it is the only provision the Government cites to support its position.

Moreover, even if § 624(c) otherwise supported the Government's view, myriad other provisions of the statute undercut that view. Under the Government's view, the default rule for confirmed officers would be that they would not be appointed absent some additional Executive act following Senate confirmation. But the delay provisions would make no sense if that were the statute's meaning. For example, the provision requiring notice of a delay prior to an officer's projected promotion date would be completely unnecessary if an officer would not expect to be appointed on that date unless otherwise notified in advance. The default contemplated by the statutory scheme is plainly that an officer will be appointed on his or her projected promotion date.[4]

At a minimum, therefore, the Government reads the following provisions entirely out of DOPMA: (1) § 624(a)(2) ("officers on a promotion list . . . shall be promoted" except as provided in the delay provisions); (2) § 624(d)(1) ("the

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[4] The Government further argues that a "coercive sanction" cannot be imposed by the courts if a statute does not specify a consequence for non-compliance with timing provisions. Opp. at 9. This is unpersuasive. Appointment of an officer nominated by the President and confirmed by the Senate is in no sense a "sanction." Promotion under DOPMA occurs by operation of the statute, and a court upholding such a promotion is merely recognizing the result Congress guaranteed in passing this legislation. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003), and *Regions Hospital v. Shalala*, 522 U.S. 448, 459 n.3 (1998), on which the Government relies, are inapposite because the courts in those cases were imposing the restrictions on agency behavior themselves, rather than applying a law that specified the appropriate result.

appointment of an officer under this section may be delayed" due to pending disciplinary or other proceedings); (3) § 624(d)(2) (providing additional grounds for delay and setting forth procedures for the promotion of delayed officers who are ultimately retained on the promotion list); (4) § 624(d)(3) ("[t]he appointment of an officer may not be delayed" without written notice "unless it is impracticable to give such written notice before the effective date of the appointment"); and (5) § 624(d)(4) (prescribing time limits for promotion delays).

Because the Government's solitary focus on § 624(c) ignores the fact that DOPMA's other provisions clearly provide that an officer is "appointed" following Senate confirmation *unless* the President takes affirmative action to remove the officer's name from the promotion list following Senate confirmation, the Government violates the principle that statutory construction "is a holistic endeavor." *See, e.g.*, *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). And because the Government offers no other defense of the decision below, the Court should grant review.

The constitutional concerns that drive the Government's reading of DOPMA are equally misplaced. When it enacted DOPMA, Congress neither enlarged its own appointment power nor impermissibly infringed on the Executive's appointment power. Similarly, DOPMA does not violate *Marbury*, as that case does not mandate that the requisite steps in the appointments process take place in any particular order. Rather, *Marbury* makes clear that appointment occurs "when it is shewn that [the President] has done everything to be performed by him." 5 U.S. at 157. As explained in the petition, when the President nominates an officer for promotion, he does so with the understanding that the officer will be appointed after Senate confirmation absent some Executive action to delay the appointment and remove the officer's name

from the promotion list during the statutorily-defined period. Pet. at 20, 28. Thus, the showing that *Marbury* requires—that the President has done all that is required of him—is made when the President nominates an officer and then chooses not to remove the confirmed officer from the promotion list within the requisite time frame.[5] *See also* Pet. at 28. The Government does not address whether *Marbury* creates an inflexible rule governing all appointments over *two centuries* later and thus barring an efficient, modern military appointments process, and that question merits review.

Finally, the Government argues that the Court should not grant the petition because Dr. Lewis is not qualified for promotion. Opp. at 7, 14. As the Government acknowledges, that *ad hominem* attack is irrelevant to the Question Presented. Opp. at 7. Dr. Lewis is a decorated officer who served with distinction and retired honorably. A board of naval officers voted to retain her despite any issue regarding her medical license. Pet. at 9-10.[6] The Government's attack is therefore as unfair as it is gratuitous, and it should not distract the Court from deciding whether the Federal Circuit's reading of DOPMA flouts the repeatedly expressed intent of Congress and the plain meaning of the statute. That reading wrongly subjects thousands of military officers to uncertainty in the promotion process, all based on a misplaced

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[5] The Government's insistence that a letter of appointment or some comparable document must be delivered to an officer to effectuate his or her promotion is unfounded. The Government points to no provision in DOPMA that requires such an additional Executive act, and it therefore cannot be the "last necessary act" to effectuate an appointment unless *M rbury* requires it. The important question of what *Marbury* requires is squarely raised here.

[6] Contrary to the Government's claim, Opp. at 7, Dr. Lewis has not conceded that the Navy properly applied 10 U.S.C. § 1094 to her. As the petition makes clear, Pet. at 12 n.9, she disagrees with the Federal Circuit's decision on the licensing issue but does not believe that question satisfies the Court's exacting criteria for a grant of certiorari.

concern about *Marbury* and the Appointments Clause. The Question Presented thus warrants review.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

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July 10, 2007

REPLY APPENDIX

COMMITTEE ON ARMED SERVICES
U.S. House of Representatives
Washington, DC 20515-6035
ONE HUNDRED EIGHTH CONGRESS

February 25, 2004

Honorable David S. C. Chu
Under Secretary of Defense
Personnel and Readiness
Pentagon 3E764
Washington, DC 20301-4000

Dear Secretary Chu:

We have become aware of a significant problem in the way that the Department of the Navy, as well as the Office of the Secretary of Defense, is handling the review of the cases of officers whose promotions have been delayed in accordance with sections 624(d) and 14311(d) of title 10, United States Code. These sections permit the delay in the promotion of officers to resolve matters that may have arisen or been discovered following the officer's selection by a promotion board. However, the statutes set a maximum delay in the promotion of such officers at 18 months from the date that the officer would have normally been promoted.

Subcommittee staff discussions with the Navy have identified a total of 33 Navy cases in which promotions have been delayed for significant periods beyond the 18-month statutory limit. For example, the promotion of one Naval

Reserve officer has been delayed since November 1, 1998 — a delay of 64 months, which is more than four years beyond the limit allowed by law. In another case, an active duty Navy officer's promotion has been delayed since May 23, 1999 — a delay of 57 months, which is more than three years beyond the limit in statute. All the other cases the subcommittee staff reviewed involve promotions that have been delayed since 2000 through 2002.

We understand that the Navy has begun a process to expeditiously resolve the cases of delayed promotions involving active duty Navy officers and to institute a system to prevent inordinate delays in the future. However, the cases involving the delayed promotions of Naval Reserve officers require that your office turn its attention to more quickly obtaining decisions on those cases which, under current procedures, may ultimately require a decision by the President.

The attached list of delayed promotions for Naval Reserve officers illustrates that inordinate delays are experienced at all levels of the chain — from the Department of the Navy through the Office of the Secretary of Defense — through which these actions must tortuously pass.

The negative impact on the officers concerned of these largely administrative delays is unwarranted. We understand that most of the officers are eventually promoted and the system does provide for the payment of lost pay. However, extended delays in promotion result in the officers losing competitiveness with their contemporaries, which ultimately means lost or degraded opportunity for future promotion.

We request that you expeditiously resolve the Naval Reserve cases on this list. Furthermore, because we believe that the problems being experienced by the Navy may also

be evident in the other military departments, we ask you undertake a review of the process and identify reforms necessary to ensure that the processing of delayed promotions for active and reserve officers in all the military departments does not exceed the statutory limit of 18 months.

We look forward to hearing from you on the results of your review and about your prescription for corrective action. As always, if there are specific actions that the subcommittee might take to assist you, we would be happy to entertain your recommendations.

Sincerely,

s/_____	s/_____
John M. McHugh	Vic Snyder
Chairman	Ranking Member
Subcommittee on Total Force	Subcommittee on Total Force

JM/VS:jdc
Enclosures